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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 123

JOHN BARTON PAYNE, SECRETARY OF THE INTERIOR, AND CLAY TALLMAN, COMMISSIONER OF THE GENERAL LAND OFFICE, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES OF AMERICA EX REL. ALLEN L. NEWTON.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED JUNE 6, 1919.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 405.

John Barton Payne ~~FRANKLIN K. LANE~~, SECRETARY OF THE INTERIOR, AND CLAY TALLMAN, COMMISSIONER OF THE GENERAL LAND OFFICE, PLAINTIFFS IN ERROR,

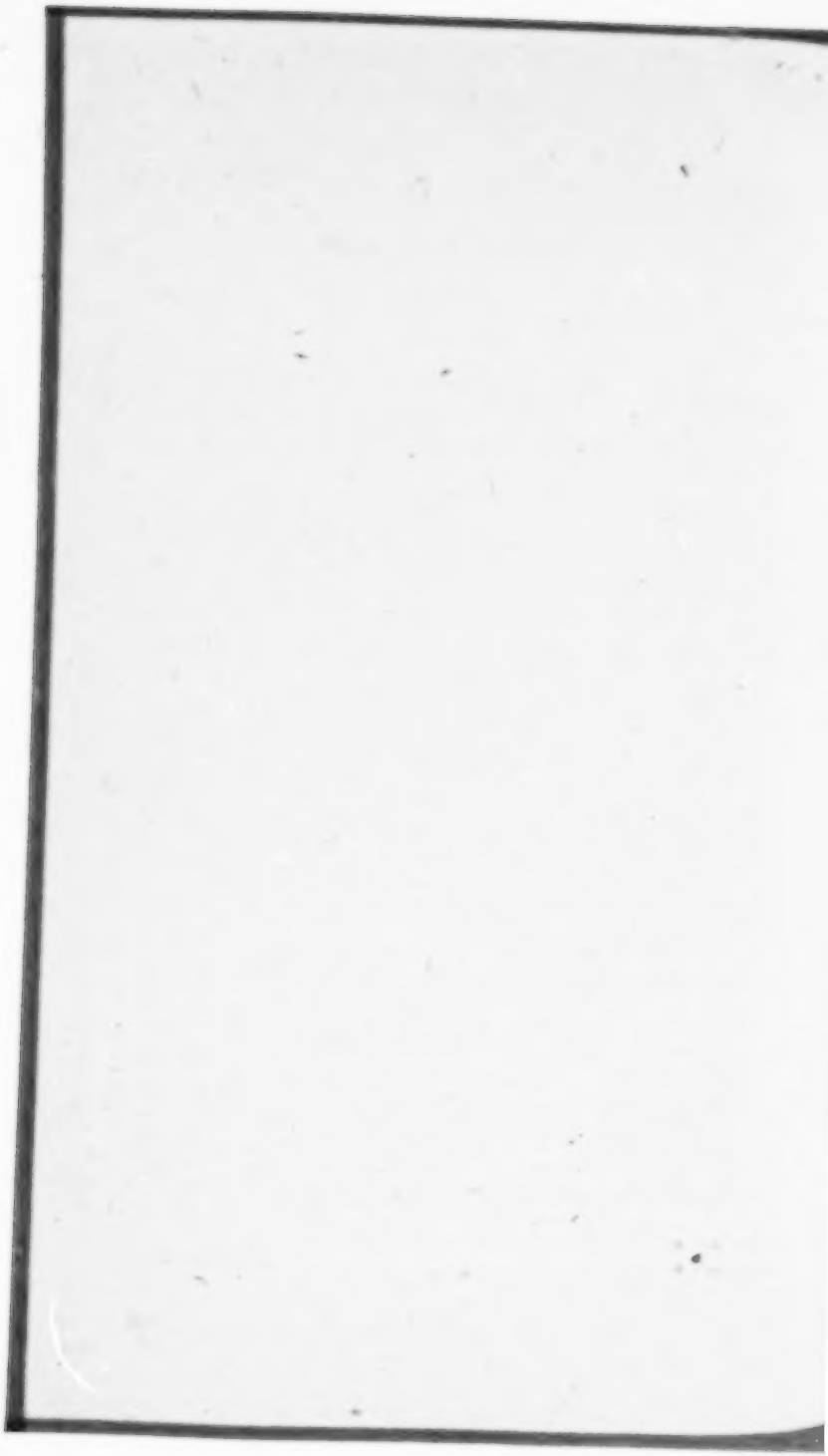
vs.

THE UNITED STATES OF AMERICA EX REL. ALLEN L. NEWTON.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

INDEX.

	Original.	Print.
Caption	1	1
Transcript from Supreme Court of the District of Columbia	1	1
Caption	1	1
Petition	1	1
Petitioner's Exhibit "A"—Petition	4	4
Rule to show cause	5	5
Marshal's return	6	5
Answer of respondents	6	6
Demurrer	8	8
Demurrer sustained; prayers of petition granted; writ of mandamus ordered to be issued; judgment; appeal noted	9	9
Assignment of errors	10	9
Designation of record	10	10
Clerk's certificate	11	10
Minute entry of argument	12	10
Opinion by Van Orsdel, J.	13	11
Concurring opinion of Smyth, C. J.	15	15
Judgment	16	16
Petition for writ of error	17	17
Assignment of errors	18	18
Order allowing writ of error	21	19
Writ of error	22	20
Citation and service	23	20
Clerk's certificate	24	21



1 Court of Appeals of the District of Columbia.

FRANKLIN K. LANE, &c., ET AL., APPELLANTS,
vs.
U. S. EX REL. ALLEN L. NEWTON. | No. 3231.

Supreme Court of the District of Columbia

THE UNITED STATES OF AMERICA EX REL. Allen L. Newton, plaintiff,
vs.
FRANKLIN K. LANE, SECRETARY OF THE INTERIOR, and Clay Tallman, Commissioner of the General Land Office, defendants. | At Law. No. 61536.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

Petition.

Filed August 5, 1918.

In the Supreme Court of the District of Columbia.

THE UNITED STATES OF AMERICA EX REL. Allen L. Newton
vs.
FRANKLIN K. LANE, SECRETARY OF THE INTERIOR, and Clay Tallman, Commissioner of the General Land Office. | At Law. 61536.

The petition of the United States on the relation of Allen L. Newton respectfully represents:

I.

That Allen L. Newton is a citizen of the State of Washington and brings this his petition for mandamus against Franklin K.
2 Lane, a citizen of the State of California, residing in the District of Columbia, in respect of the matters and things hereinafter set forth, and Clay Tallman, a citizen of the State of Nevada, residing in the District of Columbia.

II.

That at the several times hereinafter referred to, said respondents were and they still are, respectively, Secretary of the Department of

the Interior of the United States, and Commissioner of the General Land Office, and as such officers had and have, under the general supervision of the said Secretary of the Interior, charge of the administration of the laws of the United States relating to public lands, and that said respondents are sued in their official capacity aforesaid as hereinafter set forth.

III.

That the plat of survey of township 23 north, range 10 east, within the Seattle land district, in the State of Washington, was duly filed in the local land office Sept. 8, 1904, whereupon the public lands in said township became subject to entry and disposition under the homestead laws of the United States, and on that day your petitioner, Allen L. Newton, filed in the local land office at Seattle, his application and accompanying showing as required by the homestead laws and the lawful regulations of the Land Department for the entry of the northeast quarter of the southwest quarter, west half southwest quarter, and southwest quarter northwest quarter, section 20, township 23, north, range 10 east, which application was accompanied by the lawful fees and was duly received, and thereby entry was made of the lands under the homestead laws.

IV.

That after due notice by publication, your petitioner submitted proof in commutation of his homestead entry and paid the purchase price, whereupon receiver's receipt and certificate of final entry were issued to him Nov. 21, 1904.

V.

That at the expiration of two years from the issuance of the receiver's receipt on final entry, no contest, protest or other proceeding had been instituted against petitioner's said final entry; that on Nov. 27, 1908, more than four years after the issuance of the receiver's receipt on final entry, proceedings were directed against your petitioner's said homestead entry, urging failure to comply with the homestead law in the matter of residence and cultivation, and on these proceedings your petitioner's homestead entry was ordered canceled March 23, 1912. Thereafter, a petition was filed invok-

3 ing the supervisory authority of the Secretary of the Interior for the reinstatement and patenting of your petitioner's said homestead entry, based upon the proviso to section 7 of the act of March 3, 1891 (26 Stats., 1095, 1099), which reads:

"That after the lapse of two years from the date of the issuance of the receiver's receipt upon the final entry of any tract of land under the homestead, timber-culture, desert-land, or preemption laws, or under this act, and when there shall be no pending contest or protest against the validity of such entry, the entryman shall be entitled to

a patent conveying the land by him entered, and the same shall be issued to him."

VI.

That such further proceedings were thereafter had resulting in an order by the Secretary of the Interior dated May 14, 1918, and addressed to the Commissioner of the General Land Office, ordering the reinstatement and patenting of your petitioner's said entry. A copy of this order is hereto attached marked Petitioner's Exhibit "A" and made a part hereof.

VII.

That acting under the said direction of the Secretary of the Interior, the Commissioner of the General Land Office under date of June 4, 1918, duly approved your petitioner's entry for patent, and patent was about to be issued to your petitioner when, due to the intervention of the Department of Justice upon the request of the Secretary of Agriculture, the issuance of patent to your petitioner has been withheld.

VIII.

That notwithstanding the plain and unambiguous terms of the proviso to section 7 of the act of March 3, 1891, entitling your petitioner to a patent upon his said homestead entry, and notwithstanding the plain determination by the Supreme Court of the United States in the case of Franklin K. Lane *vs.* Svan Hoglund (244 U. S., 174), the patent is being withheld from your petitioner upon his homstead entry much to his annoyance, concern, and material damage, and irreparable injury:

Wherefore, the premises considered, your petitioner prays:

1. That a writ of mandamus may be issued and directed to the respondents, Franklin K. Lane, Secretary of the Interior, and Clay Tallman, Commissioner of the General Land Office, commanding them to deliver or cause to be delivered to your petitioner, a patent to the land herein described for the land covered by his said homestead entry, as by the act of March 3, 1891, exacted.

2. For such other and further right or rights, relief, or order as to the court may seem proper and the nature of petitioner's case may require.

4 To which end petioner prays that a rule may issue requiring the respondents herein, Franklin K. Lane, Secretary of the Interior, and Clay Tallman, Commissioner of the General Land Office, to show cause, if any they have, why the writ of mandamus should not issue herein as prayed.

ALLEN L. NEWTON.

STATE OF WASHINGTON, }
County of King, ss:

Allen L. Newton, being duly sworn, deposes and says that he is the petitioner herein; that he has read over and knows the matters alleged in said petition to be true except such matters as are alleged on information and belief, and as to those he believes they are true.

ALLEN L. NEWTON.

Subscribed and sworn to before me this 30th day of July, 1918.
[SEAL.]

E. C. EGLIN,
Notary Public in and for the State of Washington, Residing at Seattle.

ALEX. BRITTON,
EVANS BROWNE,
F. W. CLEMENTS,
Attorneys.

PETITIONER'S EXHIBIT "A."
Department of the Interior,
Washington.

D. 18101. MAY 14, 1918.
Ex parte Allen L. Newton.

"R."
Seattle 0782.
Canceled homestead.
entry reinstated.
Patent to issue.

Petition for the exercise of supervisory authority.

The lands involved herein are the N. E. ¼ S. W. ¼, W. ½ S. W. ¼, and S. W. ¼ N. W. ¼, sec. 20, T. 23 N., R. 10 E., Seattle, Washington, land district. The township plat of survey was filed September 8, 1904, and on the same day Allen L. Newton made homestead entry for the above described land, alleging settlement about October 1, 1902. Commutation proof was submitted and final certificate issued thereon November 21, 1904.

5 The described lands are within the Snoqualmie National Forest, and November 27, 1908, proceedings were directed against the entry upon the adverse report of a forest officer, charging, in effect, that the entryman had not complied with the law in the matter of residence and cultivation. As a result of a hearing had thereon the entry was held for cancellation by the commissioner of the General Land Office on June 27, 1911, which action was affirmed by the department March 23, 1912, and the entry was canceled June 12, 1912.

January 29, 1918, claimant filed a petition for the exercise of supervisory authority of the Secretary, asking that the decision hold-

ing his entry for cancellation be reconsidered and the land patented to him under the proviso to section 7 of the act of March 3, 1891 (26 Stat., 1095), in view of the decision in the Supreme Court rendered May 31, 1917, in the case of Lane v. Hoglund (244 U. S., 174).

February 11, 1918, the petition was entertained and service thereof has been made upon the Solicitor of the Department of Agriculture, who has submitted a brief in reply thereto urging that the case should not now be reopened on account of the laches of claimant, no action in the department or court having been sought by him for the period of more than five years after cancellation of the entry. In support of this claim cases are cited in which the department has declined to reopen its final decisions because of a subsequent change by the department in the construction of the law as held at the time it was originally adjudicated.

In view of the decision of the Supreme Court in the Hoglund case, supra, and of the fact that no adverse claim to the land has been induced by the claimant's delay in invoking relief of the department, the cancellation of the entry is vacated, the entry reinstated and patent will issue.

(Signed) ALEXANDER T. VOGELSANG,
First Assistant Secretary.

Rule to show cause.

Filed August 10, 1918.

* * * * * * *

Upon consideration of the petition filed in the above-entitled case it is by the court this 10th day of August, 1918, ordered:

That the respondents Franklin K. Lane, Secretary of the Interior, and Clay Tallman, Commissioner of the General Land Office, be, and they hereby are, required to show cause, if any they have, on or before the 13th day of September, 1918, at 10 o'clock a. m., why the writ of mandamus should not issue as in said petition prayed: Provided, That a copy of said petition and of this order be served upon said respondents on or before the 23rd day of August, 1918.

6 WILLIAM HITZ, *Justice.*

Marshal's return.

Served a copy of the within rule on Franklin K. Lane, Sect. Int., personally Aug. 14, 1918; Clay Tallman, Com. Gen. Land Office, personally Aug. 13, 1918.

MAURICE SPLAIN,
U. S. Marshal.

H.

Answer of respondents.

Filed September 12, 1918.

* * * * * * *

Come now Franklin K. Lane, Secretary of the Interior, and Clay Tallman, Commissioner of the General Land Office, respondents in the above-entitled cause, and for answer to the rule to show cause why mandamus should not issue as prayed in relator's petition say:

1. They admit the averments in Paragraph I.

2. They admit the averments in Paragraph II with this exception: That said respondents were not Secretary of the Interior and Commissioner of the General Land Office, respectively, at any of the times specified in Paragraphs III and IV, nor at the times specified in Paragraph V prior to the filing of the said motion for supervisory authority mentioned in the last specified paragraph.

3. They admit generally the averments in Paragraph III, IV, V, VI, and VII, but do not concede or admit that the allowance of the homestead entry of said relator, Newton, or the issuance of the receiver's receipt and certificate of final entry thereon, set forth in Paragraphs III and IV, was with full knowledge of the facts with respect to said alleged settlement rights, residence and compliance with law with respect to said settlement and entry.

Further, respondents deny that upon the filing of the plat of survey of the township specified in Paragraph III, the public lands therein became subject to homestead entry generally. On the contrary, respondents aver that by reason of a prior withdrawal of said lands for forestry purposes, as hereinafter more specifically set forth, only such lands became subject to homestead entry, upon which there had been prior to the date of said withdrawal a bona fide settlement made and which had been continued from the initiation thereof up to the date of filing application for entry thereof in the proper United States land office.

4. They admit the allegation in Paragraph VIII with respect to the withholding of patent upon the said homestead entry of relator, Newton, but with respect to the other allegations contained therein say that they are mere conclusions of law to which they, the said respondents, are not required to answer.

7 5. For a further and complete answer to the rule, the respondents aver that on December 27, 1902, by order of the Secretary of the Interior, the lands involved herein with others were, with a view to their inclusion in a forest reserve, withdrawn from all settlement, entry, sale, or other form of disposal. The said order of withdrawal excepted from the force and effect thereof valid claims upon said lands properly initiated prior to the date thereof. Subsequently, by proclamation of the President dated March 2, 1907 (34 Stat., 3297), said land was made a part of the Washington National

Forest and said forest is now known and designated as the Snoqualmie National Forest.

Furthermore, the allowance of his entry, in face of the withdrawal of said lands, and the issuance of the receiver's receipt and register's final certificate on the proof tendered in support of said entry, were obtained by said relator Newton fraudulently and by false representations and proofs, to the effect that he had made settlement upon said lands prior to the withdrawal of said land as aforesaid and that he had since said settlement continuously resided upon the same and had placed substantial improvements thereon and had cultivated a portion of said land and raised crops thereon.

That the false proofs and representations were made and tendered by said Newton with full knowledge of their falsity and with intent to deceive the officials of the Land Department and thereby to induce them to allow his tendered filing and to accept his final commutation proof thereon and to issue to him the receipt and certificate aforesaid. The said officials were deceived thereby and did act in reliance upon said false and fraudulent representations.

The action of the Land Department in cancelling the homestead entry of relator, as averred in his petition, was predicated upon a specific finding by that department that the entryman therein, the relator, Newton, here, had not established and maintained residence upon the land covered by his homestead entry. Said decision was based upon evidence adduced on behalf of both the Government and claimant, Newton, at a hearing conducted pursuant to the rules of practice of the Land Department.

The decision of the Department of the Interior, upon the petition for exercise of supervisory authority by which the cancellation of the entry was vacated, the entry reinstated and direction for the issuance of patent thereon given, was predicated solely upon the ground of that department's supposed lack of jurisdiction to entertain the proceedings which resulted in the previous cancellation of the entry and was in no way based upon a reconsideration of the evidence in the case or a conclusion that the finding of facts in respect to failure to comply with the law, was erroneous. On the contrary, the said respondents allege that the evidence in the case clearly supports the conclusion that the issuance of final receipt and final certificate was fraudulently procured through false testimony, and if a patent had been issued upon said relator's entry, it would be the plain duty of the respondents to request the Attorney General to in-
8 stitute a suit in the proper court to secure the annulment and cancellation of such patent.

In view of the clear, unequivocal and convincing evidence of fraud by the said relator in procuring the allowance of his homestead entry and the issuance of the receiver's receipt and register's certificate thereon, the Attorney General, at the request of the Secretary of Agriculture and of these respondents, did institute on September 4, 1918, in the United States Court in and for the Western District of Washington, a suit in equity, styled United States of

America v. Allen L. Newton, Jane Doe Newton, and J. M. Ryley, which said suit is now pending and undetermined, to cancel the final receipt and certificate issued on the homestead entry of the said relator Newton, and to quiet title in the United States in and to land covered by said entry.

Wherefore, having made complete answer to the rule to show cause, the respondents pray that the same may be discharged, that the petition herein filed be dismissed with reasonable costs to these respondents, and they may be permitted to go hence without day.

FRANKLIN K. LANE,
Secretary of the Interior.
CLAY TALLMAN,
Commissioner of the General Land Office.

FRANCIS J. KEARFUL,
Assistant Attorney General;
LESLIE C. GARNETT,
Attorneys for Respondents.

DISTRICT OF COLUMBIA, *ss:*

Franklin K. Lane, Secretary of the Interior, being first duly sworn, says that he has read the foregoing answer and knows the contents thereof; that the matters and things set forth are true to the best of his knowledge and belief.

FRANKLIN K. LANE,
Secretary of the Interior.

Subscribed and sworn to before me this 11th day of September, 1918.

[SEAL.]
W. BERTRAND ACKER,
Notary Public in and for the District of Columbia.

Demurrer.

Filed September 20, 1918.

* * * * * * *

Comes now the relator by his attorneys, and says that the answer of the defendants to the rule to show cause issued in the above cause is bad in substance.

9 *Points to be argued.*

1. The decision of the United States Supreme Court in the case of Lane, Secretary of the Interior, *v.* Hoglund (244 U. S., 174), disposes of all matters set forth in the said answer.

2. The allegations of fraudulent representations by the relator are indefinite and insufficient to receive the attention of the court. In

so far, however, as disclosed they clearly indicate, what would be plain on a more definite statement, that they relate solely to the quality of the residence of the relator upon the land entered under the homestead laws and therefore involve a question of compliance with the homestead law respecting residence, inquiry into which was barred after the expiration of two years from the issuance of receiver's receipt on final entry, and cannot be inquired into in these proceedings.

ALEX. BRITTON,
F. W. CLEMENTS,
Attorneys for Allen L. Newton.

Supreme Court of the District of Columbia.

FRIDAY, *October 25th, 1918.*

Session resumed pursuant to adjournment, Hon. Wendell P. Stafford, justice, presiding.

* * * * * * *

This cause came on to be heard upon the petition, the rule to show cause, the answer to said rule and petition and demurrer to said answer, and after argument by the respective attorneys of record, was submitted to the court. Whereupon, the same being considered, it is ordered that said demurrer be, and the same is hereby, sustained; thereupon the respondents by their said attorneys elect to stand upon said answer.

Wherefore, it is considered and ordered that the prayers of the petition be, and the same are hereby, granted and that a writ of mandamus be issued herein directed to the respondents, commanding them to deliver or cause to be delivered to the petitioner a patent to the land in said petition described for the land covered by his homestead entry, as by the act of March 3, 1891, enacted. Further, that the petitioner recover of said respondents his costs of suit and have execution therefor as the same are taxed by the clerk.

From the foregoing, the respondents, by their said attorneys, in open court, note an appeal to the Court of Appeals of the District of Columbia.

10 *Assignment of errors.*

Filed November 11, 1918.

* * * * * * *

Now come Franklin K. Lane, Secretary of the Interior, and Clay Tallman, Commissioner of the General Land Office, defendants in the above numbered and entitled cause, and in connection with their petition for writ of error in this cause assign the following errors upon which they rely for a reversal of the judgment entered herein as appears of record:

1. That the court erred in sustaining the demurrer to the answer of the defendants filed in this cause.
2. That the court erred in not overruling the demurrer to the answer filed in this cause.
3. That the court erred in entering an order awarding a writ of mandamus.
4. That the court erred in not entering an order denying a writ of mandamus.

FRANCIS J. KEARFUL,
LESLIE C. GARNETT,
Attorneys for Plaintiffs in Error.

Designation of record.

Filed November 11, 1918.

* * * * * * *

For the purposes of the writ of error prayed and allowed herein on the —— day of ——, 1918, the clerk will please prepare a transcript of record, including therein the following:

1. Petition for a writ of mandamus, including all exhibits.
2. Rule to show cause.
3. Answer of respondents.
4. Order of court sustaining demurrer and ordering mandamus to issue.
5. Assignment of errors.
6. This præcipe.

FRANCIS J. KEARFUL,
LESLIE C. GARNETT,
Attorneys for Plaintiffs in Error.

O. K.:
F. W. CLEMENTS.

11 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 14, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 61536 at law, wherein The United States of America ex rel. Allen L. Newton is plaintiff and Franklin K. Lane, Secretary of the Interior, and Clay Tallman, Commissioner of the General Land Office are defendants, as the same remains upon the files and of record in said court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 22nd day of November, 1918.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

(Endorsed on cover:) District of Columbia Supreme Court. No. 3231. Franklin K. Lane, &c., et al., appellants, vs. U. S. ex rel. Allen L. Newton. Court of Appeals, District of Columbia. Filed Nov. 30, 1918. Henry W. Hodges, clerk.

12 Thursday, February 6th, A. D. 1919.

FRANKLIN K. LANE, SECRETARY OF THE INTERIOR, AND CLAY Tallman, Commissioner of the General Land Office, appellants.
vs.
THE UNITED STATES OF AMERICA EX REL. ALLEN L. NEWTON. } No. 3231.

The argument in the above-entitled cause was commenced by Mr. L. C. Garnett, attorney for the appellants, and was continued by Mr. F. W. Clements, attorney for the appellee, and was concluded by Mr. L. C. Garnett, attorney for the appellants.

13 Court of Appeals of the District of Columbia.

FRANKLIN K. LANE, SECRETARY OF THE INTERIOR, AND CLAY Tallman, Commissioner of the General Land Office, appellants.
vs.
THE UNITED STATES OF AMERICA EX REL. ALLEN L. NEWTON, appellee. } No. 3231.

Opinion.

Mr. Justice Van Orsdel delivered the opinion of the court:

This appeal is from a judgment of the Supreme Court of the District of Columbia, directing the issue of a writ of mandamus commanding respondents, Franklin K. Lane, Secretary of the Interior, and Clay Tallman, Commissioner of the General Land Office, to issue and deliver to relator, Allen L. Newton, a patent to certain public lands of the United States.

It appears from the petition that, on September 8, 1904, a plat of survey containing the lands in question was filed in the local land office at Seattle, Washington; that, on the same day, relator filed a homestead entry thereon, and that, on November 21, 1904, he submitted proof in commutation of his entry and paid the purchase price required by law, whereupon a receiver's receipt and certificate of final entry were issued to him. On November 27, 1908, over four years after the issuance of the final receipt, proceedings were instituted against relator for the cancellation of his final receipt for

"failure to comply with the homestead law in the matter of residence and cultivation." As a result of this investigation, which appears to be the only one ever made, relator's entry was ordered cancelled March 23, 1912.

On May 14, 1918, the Secretary made an order, in part, as follows: "January 29, 1918, claimant filed a petition for the exercise of supervisory authority of the Secretary, asking that the decision holding his entry for cancellation be reconsidered and the land patented to him under the proviso to section 7 of the act of March 3, 1891 (26 Stats., 1095), in view of the decision in the Supreme Court rendered May 31, 1917, in the case of Lane v. Hoglund, 244 U. S., 174.

14 * * * In view of the decision of the Supreme Court in the Hoglund case, supra, and of the fact that no adverse claim to the land has been induced by the claimant's delay in invoking relief of the department, the cancellation of the entry is vacated, the entry reinstated and patent will issue." Following this order, the Commissioner of the General Land Office approved the entry for patent, but the Department of Justice, upon the request of the Secretary of Agriculture, intervened, and the issuance of the patent has since been withheld.

For answer, respondents admit the foregoing facts, but allege that the final receipt was procured "fraudulently and by false representations and proofs, to the effect that he had made settlement upon said lands prior to the withdrawal of said land as aforesaid and that he had since said settlement continuously resided upon the same and had placed substantial improvements thereon and had cultivated a portion of said land and raised crops thereon." It is further alleged that a suit in equity has been brought in the United States Court for the Western District of Washington for the cancellation of the final receipt and to quiet title to said land in the United States.

Relator demurred to the answer. On hearing, the demurrer was sustained, with judgment for relator.

The decision here must turn upon the interpretation to be placed upon the following proviso to section 7 of the act of Congress of March 3, 1891 (26 Stats. L., 1095, 1099): "That after the lapse of two years from the date of the issuance of the receiver's receipt upon the final entry of any tract of land under the homestead, timber-culture, desert-land, or preemption laws, or under this act, and when there shall be no pending contest or protest against the validity of such entry, the entryman shall be entitled to a patent conveying the land by him entered, and the same shall be issued to him: but this proviso shall not be construed to require the delay of two years from the date of said entry before the issuing of a patent therefor."

It is conceded that no contest or protest or any proceeding whatever was directed against this entry within two years after the issuance of the final receipt. But it is urged that, inasmuch as the proceedings for cancellation finally instituted were based upon alleged fraud, the action is not barred by the limitations of the foregoing statute. Many cases are cited by respondents to the effect that

proceedings in the Land Office to acquire title to public lands may be opened and set aside for fraud at any time prior to the issue of patent. But in no case has such a ruling been made in the face of a limitation terminating the Secretary's jurisdiction.

The provision of the statute before us was considered by this court in the case of Hoglund *v.* Lane, 44 App. D. C., 310. The facts in that case were substantially the same as in the case at bar. There, as here, cancellation of the entry was sought "on account of non-residence and lack of cultivation." The facts relied upon in the answer to sustain the jurisdiction of the department were substantially the same in both cases. The present case is differentiated, however, by the averment that, by reason of the alleged acts, the final receipt was fraudulently procured.

In any event, the court below properly sustained the demurrer. Accepting the contention of counsel for the Government that the department had jurisdiction to reopen the case, it could do so only on the ground of fraud discovered after the statute of limitations had run. In this, the answer fails to respond to an elementary rule of pleading, since no excuse is assigned for failure to discover the alleged fraud within the two-year period. In United States *v.* Diamond Coal & Coke Co., 254 Fed., 266, a bill of complaint attempting to annul patents to coal lands under section 8 of the present act was held defective for failure to allege "the time when the fraud was discovered, the circumstances of its discovery, what the discovery was, and why it was not made before so that the court may clearly see that the discovery could not have been made before by the exercise of ordinary diligence." This rule of pleading, however, is elementary. Wood *v.* Carpenter, 101 U. S., 135, 140, 143; Badger *v.* Badger, 2 Wall., 87, 95. The application of the rule is the same, whether the court is considering the sufficiency of a bill of complaint or, as here, an answer in which an attempt is made to plead fraud as an affirmative defense.

The vague and evasive language here employed to set up fraud, without any attempt to justify the delay, is indicative of a fictitious defense. The facts relied upon are not of such a character that their discovery need involve the Land Department in any difficulty whatever. Efficient administration would seem to dictate an inquiry into the facts before the issue of a final receipt, which would disclose fraud, if it existed, more readily and much more accurately than to negligently allow the investigation, as in this instance, to be postponed for years. The department has at its command officials, presumably capable, whose duty it is to make such investigations; hence, there is no excuse for failure to set forth the impediments, if any in fact exist, to an earlier discovery of the alleged fraud.

But treating the charge of fraud in the present case as completely distinguishing it in respect of the issues of fact from the Hoglund case, we think respondents' case is not strengthened. We there held the limitation was jurisdictional, and a bar to any action by the department against an uncontested entry, after the lapse of two years,

and that nothing remained for the department but the mere ministerial act of issuing a patent.

In the Hoglund case, construing the statute, we said: "It is clear that the above proviso is jurisdictional in its operation, and fixes a limitation beyond which the Secretary is without jurisdiction to question the right of an entryman to his patent. We are not estopped to construe the act by a departmental construction of it in this case. It is urged by counsel for the Government that it is merely a statute of limitations, and the petitioner waived its benefit by failing to take timely advantage of it. It is not a mere statute of limitations, which relates to and affects procedure, and could therefore be waived. It is a stunute of repose affecting and settling the title to real estate. It establishes a limitation within which the Government or a private individual may by protest or contest challenge the title of an entryman. When the time expires, the right ceases."

15 On appeal (Lane v. Hoglund, 244 U. S., 174), the Supreme Court, affirming this court, said: 'Looking, then, at the statute in the light of all that bears upon its purpose and meaning, we think it certainly and unmistakably lays upon the Secretary of the Interior, as the head of the Land Department, a plain duty to cause a patent to be issued to a homestead entryman whenever it appears, as concededly it did in this instance, that two years have elapsed since the issue of the receiver's receipt upon the final entry and that during that period no proceeding has been initiated or order made which calls in question the validity of the entry. In the exercise of its discretion Congress has said, in substance, by this statute that for two years after the entryman submits final proof and obtains the receiver's receipt the entry may be held open for the initiation of proceedings to test its validity, but that if none such be begun within that time it shall be passed to patent as a matter of course. Thus, in a case like this, where according to the conceded facts no proceeding was begun within the prescribed period, there is no room for the exercise of discretion or judgment, but on the contrary a plain duty to see that the entryman receives a patent."

The purpose of Congress in enacting this limitation, as reviewed at length in the opinion of the Supreme Court was to clear the Land Department of large numbers of entries which "were suspended by the General Land Office on vague and indefinite suggestions of fraud or noncompliance with law, to await investigation by special agents of that bureau. These suspensions were so numerous and the force available for investigation was so insufficient as to create a practical blockade in the issuance of patents to the serious prejudice of bona fide claimants under the public land laws."

This proviso, in conjunction with the next succeeding section of the act, discloses a design on the part of Congress not only to prevent delays in the Land Department and in the courts, but to establish the security of patent titles. Section 8, among other things, provides "That suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the

passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents." This placed a limitation upon the bringing of suits in equity to annul patents, except in cases based upon fraud, in which the limitations of the statute do not begin to run until the discovery of the fraud. Exploration Co. et al. v. United States, 247 U. S., 435. The act indicates a clear intention on the part of Congress to fix a limitation upon the jurisdiction of the Land Department for any reason whatever to question the validity of an entryman's right to a patent, and a like limitation within which the patent may be annulled in a court of equity having jurisdiction of the res.

No reason has been advanced that would justify us in distinguishing the interpretation to be placed upon the statute in this case from that placed upon it in the Hoglund case. Indeed, the department was so convinced, until the intervention of the Agricultural Department through the Department of Justice; and the Department of Justice, out of abundant caution, has already instituted a suit in equity, apparently intending, if possible, to secure a judicial cancellation of the final receipt in advance of a final mandate compelling the issuance of a patent.

But it is urged that the issuance of a writ in this case would amount to a perpetuation of a fraud. Of course, mandamus is not a writ of right. Its function is to prevent fraud, and not to perpetuate it. But the question here is one of power. If the Land Department is without jurisdiction to act in the premises, fraud will not confer jurisdiction. The Congress has seen fit, at the termination of the two-year limitation after the issuance of a final receipt, if no contest or protest has been directed against the entry, to transfer jurisdiction of the whole subject matter from the department to the courts. A mere declaration of fraud can not restore the jurisdiction after it has been lost by the running of the statute of limitations. To resume jurisdiction in such a case recourse must be had to a proceeding in equity, a jurisdiction not possessed by the Land Department. The action here is not to perpetuate a fraud or to compel the performance of an act which would have that result. It is to compel the performance of a mere ministerial act imposed by statute. If fraud in fact exists, it can be remedied in the courts as Congress has expressly directed.

The judgment is affirmed with costs.

Affirmed.

Mr. Chief Justice SMYTH concurring specially.

The act of Congress under consideration, according to a decision of the Supreme Court of the United States, is a "statute of limitations and repose." Lane v. Hoglund, 244 U. S., 174, 178. Being a statute of limitations there is an implied condition therein that in case of fraud it shall not commence to run until the fraud is dis-

covered. "A statute of limitations," says Judge Story, "ought not, then, to be so construed as to become an instrument to encourage fraud, if it admits of any other reasonable interpretation; and cases of fraud, therefore, form an implied exception, to be acted upon by courts of law and equity, according to the nature of their respective jurisdictions." Sherwood v. Sutton, 5 Mason, 143. The Supreme Court of the United States in construing a statute of limitations, section 8 of the act before us, approved the language of Judge Story just quoted, and said: "The cause of action did not accrue until the discovery of the fraud; that such was the undisputed doctrine of courts of equity, and that the weight of authority, English and American, applied the same rule to actions at law." Exploration Co. v. United States, 247 U. S., 435, 447. See also Bailey v. Glover, 21 Wall., 342; Rosenthal v. Walker, 111 U. S., 185, 190; State v. Stone Cattle Co., 66 Tex., 363, 367. It appearing by the petition of relator that at the time the Secretary of the Interior declined to deliver the patent more than two years had elapsed since the receiver's receipt and certificate of final entry were issued, it devolved upon the appellants to show that the fraud charged was not discovered by them two years before they took action to set aside the entry. This they failed to do in their answer, and, therefore, the right to further withhold the patent is barred.

I do not overlook the principle that a mandamus will not be awarded "to compel the performance of a wrong or to confirm or perpetuate a fraud." (Lane v. Duncan Townsite Co., 44 App. D. C., 63, 67; 245 U. S., 311); and if there was before us such evidence of fraud as we could consider I would be of the opinion that a mandamus should be denied. But a demurrer admits only such facts as are well pleaded (20 How., 108, 125), and the facts set forth in the answer are not well pleaded—are not pleaded so as to constitute a defense—and therefore must be put out of sight and the case considered as if they were not in it. This being so, the judgment awarding the writ should be affirmed.

Affirmed.

16 Monday, March 31st, A. D. 1919.

FRANKLIN K. LANE, SECRETARY OF THE INTERIOR, and Clay Tallman, Commissioner of the General Land Office, appellants,
vs.
THE UNITED STATES OF AMERICA EX REL. Allen L. Newton.

No. 3231.
January Term, 1919.

Appeal from the Supreme Court of the District of Columbia. This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia and was argued by counsel. On consideration whereof, It is now here ordered and

adjudged by this court that the judgment of the said Supreme Court in this cause be and the same is hereby affirmed with costs.

Per Mr. Justice Van Orsdel.

March 31, 1919.

Mr. Chief Justice Smyth concurring specially.

17 In the Court of Appeals of the District of Columbia.

April Term, 1919.

FRANKLIN K. LANE, THE SECRETARY OF THE INTERIOR, and Clay Tallman, the Commissioner of the General Land Office, appellants,
vs.
THE UNITED STATES OF AMERICA EX REL. ALLEN L. Newton, Appellee.
No. 3231.

Petition for writ of error.

Now come Franklin K. Lane, Secretary of the Interior, and Clay Tallman, Commissioner of the General Land Office, appellants in the above-entitled cause, and respectfully show that on or about the 31st day of March, 1919, this court entered a judgement herein in favor of the appellee, Allen L. Newton, and against the appellants, affirming the judgment of the Supreme Court of the District of Columbia sustaining a demurrer to the answer of the petitioners, appellants herein, in favor of the appellee, in which judgment certain errors were committed to the prejudice of the appellants, all of which will appear more in detail from the assignment of errors filed with this petition.

Wherefore, the appellants pray that a writ of error may issue in this behalf out of the Supreme Court of the United States for correction of the errors complained of and that a transcript of the record of proceedings in this cause, duly authenticated, be sent to the Supreme Court of the United States and the mandate of this court be stayed until further order.

FRANKLIN K. LANE,
Secretary of the Interior.

CLAY TALLMAN,
Commissioner of the General Land Office.

By their attorneys:
F. J. KEARFUL,
Assistant Attorney General.
LESLIE C. GARNETT, *Attorney.*

18 In the Court of Appeals of the District of Columbia.

April Term, 1919.

FRANKLIN K. LANE, THE SECRETARY OF THE INTERIOR, and Clay Tallman, the Commissioner of the General Land Office, appellants,
vs.
THE UNITED STATES OF AMERICA EX REL. ALLEN L. NEWTON, appellee.
No. 3231.

Assignment of errors.

Now come Franklin K. Lane, Secretary of the Interior, and Clay Tallman, Commissioner of the General Land Office, appellants in the above numbered and entitled cause, and in connection with their petition for a writ of error assign the following errors upon which they rely for a reversal of the judgment entered herein affirming the judgment of the Supreme Court of the District of Columbia directing the issuance of a writ of mandamus against the appellants:

1. The Court of Appeals erred in affirming the judgment of the Supreme Court of the District of Columbia in favor of the appellee Newton and directing the issuance of a mandamus against the appellants.

2. The Court of Appeals erred in not reversing the judgment of the Supreme Court of the District of Columbia in favor of the appellee Newton and directing the issuance of a mandamus against the appellants.

3. The Court of Appeals erred in holding that the limitation in section 7 of the act of March 3, 1891 (26 Stat., 1095), is jurisdictional and a complete bar after the lapse of two years from the issuance of final receipt and certificate to any action against a fraudulent entry prior to the issuance of patent.

4. The Court of Appeals erred in not holding that the limitation in section 7 of the act of March 3, 1891 (26 Stat., 1095), is not jurisdictional and not a complete bar after the lapse of two years from the issuance of final receipt and certificate to any action against a fraudulent entry prior to the issuance of patent.

5. The Court of Appeals erred in holding that after the lapse of two years from the date of the issuance of the receiver's final receipt the Land Department is without jurisdiction to cancel the final receipt for fraud.

6. The Court of Appeals erred in not holding that after the lapse of two years from the date of the issuance of the receiver's final receipt the Land Department has jurisdiction to cancel the final receipt for fraud.

7. The Court of Appeals erred in holding that after the lapse of two years from the issuance of final receipt, the United States has

no right to invoke the aid of a court of equity to cancel for fraud the final receipt and certificate.

8. The Court of Appeals erred in not holding that after the lapse of two years from the issuance of final receipt, the United States has the right to invoke the aid of a court of equity to cancel for fraud the final receipt and certificate.

9. The Court of Appeals erred in affirming the judgment of the Supreme Court of the District of Columbia directing the issuance of a writ of mandamus pending the determination of the suit instituted in the United State Court for the Western District of Washington to cancel for fraud the final receipt and certificate.

10. The Court of Appeals erred in not reversing the judgment of the Supreme Court of the District of Columbia directing the issuance of a writ of mandamus pending the determination of the suit instituted in the United States Court for the Western District of Washington to cancel for fraud the final receipt and certificate.

Wherefore, the appellants pray that for the errors aforesaid and other errors appearing in the record of the Court of Appeals
20 in the said cause to the prejudice of appellants, said judgment of the said Court of Appeals may be reversed and annulled and the said cause be remanded for such further proceedings as may be determined by the Supreme Court of the United States.

FRANKLIN K. LANE,
Secretary of the Interior.
CLAY TALLMAN,
Commissioner of the General Land Office.

By their attorneys:
F. J. KEARFUL,
Assistant Attorney General.
LESLIE C. GARNETT,
Attorney.

(Endorsed:) No. 3231. Franklin K. Lane, the Secretary of the Interior, and Clay Tallman, the Commissioner of the General Land Office, appellants, v. The United States of America ex rel Allen L. Newton, appellee. Petition for writ of error and assignment of errors. Court of Appeals, District of Columbia. Filed May 26, 1919, Henry W. Hodges, clerk.

21 Monday, May 26th, A. D. 1919.

FRANKLIN K. LANE, SECRETARY OF THE INTERIOR, AND Clay Tallman, Commissioner of the General Land Office, Appellants,
vs.
THE UNITED STATES OF AMERICA EX REL. ALLEN L. NEWTON. } No. 3231.

On consideration of the petition for the allowance of a writ of error to remove the above entitled cause to the Supreme Court of the

United States, It is by the court this day ordered that the said writ issue as prayed.

22 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the justices of the Court of Appeals of the District of Columbia, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between Franklin K. Lane, Secretary of the Interior, and Clay Tallman, Commissioner of the General Land Office, appellants, and The United States of America ex rel. Allen L. Newton, appellee, a manifest error hath happened, to the great damage of the said appellants as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 26th day of May, in the year of our Lord one thousand nine hundred and nineteen.

[SEAL.] HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

23 UNITED STATES OF AMERICA, *ss:*

To the United States of America ex rel. Allen L. Newton, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein Franklin K. Lane, Secretary of the Interior, and Clay Tallman, Commissioner of the General Land Office, are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Constantine J. Smyth, Chief Justice of the Court of Appeals of the District of Columbia, this 26th day of

May, in the year of our Lord one thousand nine hundred and nineteen.

CONSTANTINE J. SMYTH,
Chief Justice of the Court of Appeals of the District of Columbia.

Service acknowledged May 27, 1919.

F. W. CLEMENTS,
Counsel for Appellee.

24 Court of Appeals of the District of Columbia.

I, Henry W. Hodges, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 23, inclusive, constitute a true copy of the transcript of record and proceedings of said Court of Appeals, in the case of Franklin K. Lane, Secretary of the Interior, and Clay Tallman, Commissioner of the General Land Office, appellants, vs. The United States of America ex rel. Allen L. Newton, No. 3231, April term, 1919, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 27th day of May, A. D. 1919.

[SEAL.] HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

(Endorsement on cover:) File No. 27160. District of Columbia, Court of Appeals. Term No. 405. Franklin K. Lane, Secretary of the Interior, and Clay Tallman, Commissioner of the General Land Office, plaintiffs in error, vs. The United States of America ex rel. Allen L. Newton. Filed June 6, 1919. File No. 27160.

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In the Supreme Court of the United States.

OCTOBER TERM, 1919.

FRANKLIN K. LANE, SECRETARY OF THE Interior, and Clay Tallman, Commissioner of the General Land Office, plaintiffs in error, v. THE UNITED STATES OF AMERICA EX REL. Allen L. Newton.	No. 405.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

MOTION TO SUBSTITUTE AS ONE OF THE PLAINTIFFS IN ERROR JOHN BARTON PAYNE, PRESENT SECRETARY OF THE INTERIOR, IN THE PLACE OF FRANKLIN K. LANE, FORMER SECRETARY THEREOF.

Comes now the Solicitor General, and suggesting to the court the resignation of Franklin K. Lane as Secretary of the Interior and the appointment of John Barton Payne as his successor, respectfully moves the court that said John Barton Payne, in his capacity as Secretary of the Interior, be substituted as one of the plaintiffs in error in this case in the place and stead of said Franklin K. Lane.

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This suit was instituted to secure a writ of mandamus against said Lane, as Secretary of the Interior, and said Tallman, as Commissioner of the General Land Office, to compel the the issuance of a patent to relator on his homestead entry for certain lands in the State of Washington. The writ of error brings up for review the judgment of the Court of Appeals of the District of Columbia affirming the judgment of the Supreme Court of the District awarding the writ.

As said Lane was made a party solely in his official capacity as Secretary of the Interior, and in order to prevent abatement of the proceedings in error as to the Secretary of the Interior, it is respectfully requested that the substitution moved be granted.

ALEX. C. KING,
Solicitor General.

MARCH, 1920.

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In the Supreme Court of the United States.

OCTOBER TERM, 1919.

FRANKLIN K. LANE, Secretary of the Interior, and CLAY TALLMAN, Commissioner of the General Land Office, Plaintiffs in Error,

v.

THE UNITED STATES OF AMERICA, ex rel. ALLEN L. NEWTON.

No. 405.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR PLAINTIFFS IN ERROR IN OPPOSITION TO MOTION TO DISMISS.

For the purpose of consideration of the motion to dismiss it is deemed unnecessary to do more than briefly set forth the issues raised in this case by the plaintiffs in error and their contention with respect to them.

To the rule to show cause issued upon relator Newton's petition, plaintiffs in error answered that the land covered by Newton's homestead entry had, prior to the application for that entry, been withdrawn for forestry purposes and subsequently included in a national forest; that the allowance of Newton's entry in the face of the withdrawal of the lands, and the issuance of final receipt and certificate thereon by the officials of the Land Department were obtained by the entryman fraudulently by

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means of false representations and proofs to the effect that he had made settlement upon the lands prior to withdrawal, and had since that settlement resided continuously thereon and cultivated a portion of the lands. It was further averred that said representations were made by Newton with full knowledge of their falsity and with intent to deceive the officials of the Land Department, and that said officials were deceived and acted in reliance thereon.

It was further alleged that should a patent issue on Newton's entry, it would be the duty of the respondents, the Secretary of the Interior and the Commissioner of the General Land Office, to request the Attorney General to institute suit for its cancellation, in view of the clear, unequivocal and convincing evidence of fraud in relation to the entry; that a suit had been instituted in the United States District Court for the western district of Washington by the United States against Newton and others to cancel, on the ground of fraud, the final receipt and certificate issued to Newton and to quiet title in the United States in and to the land involved in the entry; and that that suit was pending and undetermined.

We assert that the courts below were in error in awarding a mandamus, in view of the pendency of the suit brought to cancel the final receipt and certificate and to quiet title. Neither of the courts below appears to have given proper consideration to that point although it was squarely presented. It can not in reason be contended that the Secretary of the Interior should issue a patent to Newton

when there is before him clear evidence of such fraud as would vitiate the patent. The Secretary would do a vain and foolish thing to issue a patent and then immediately cause suit to be filed to cancel that patent for fraud known to him when he issued it. *Knight* v. *Land Association*, 142 U. S. 161, 178. And if the Secretary should not issue a patent there is less reason for urging that the courts, by mandamus, should compel him to do so when fraud is shown. The Government has a right of action because of the fraud; if it can not obtain redress in the Land Department it surely can in the courts, and its right thereto is not dependent upon the issuance of patent.

Again, the issuance of a writ of mandamus in this case is improper because, in view of the fraud, Newton does not come into court with clean hands. The writ will not issue to condone or perpetuate a fraud. *Duncan Townsite Company* v. *Lane*, 245 U. S. 308, 311.

Finally, we firmly believe that this case is clearly distinguishable from the case of *Lane* v. *Hoglund*, 244 U. S. 174, upon which the courts below relied.

The proviso to section 7 of the act of March 3, 1891, 26 Stat. 1095, 1099, about which this controversy centers, is in our view a statute of limitation upon action by the Land Department but is not applicable in cases of fraud. Fraud is alleged in this case. Indeed, it was proved in the contest proceedings had before the Land Department which resulted in the cancellation of Newton's entry. Therefore, in the face of fraud, the statute is not operative to deprive

the Secretary of the Interior of power to take jurisdiction of contest proceedings testing the validity of an entry.

In *Lane* v. *Hoglund*, *supra*, there was no allegation of fraud in the procurement of the allowance of the entry and the issuance of final receipt and certificate, as in this case. The pleadings and agreed statement of facts in that case contained no allegation or statement that the entry had been canceled for fraud. The decision in the *Hoglund* case must be read in the light of the record before the court in that case. The question of the effect of fraud upon the operation of the proviso to section 7 of the act of March 3, 1891, was not presented to or apparently considered by the court in the *Hoglund* case.

The purpose of the proviso was to relieve *bona fide claimants* from hardship due to delay on the part of the General Land Office in acting on entries. It was not intended to reward fraud.

These points will be more fully discussed in the brief which will be presented when the case is heard on the merits. The outline here given is thought amply sufficient to show the merit in the case, and it follows that the motion to dismiss or affirm should be denied.

Respectfully submitted.

FRANK K. NEBEKER,
Assistant Attorney General.
H. L. UNDERWOOD,
Special Assistant to the Attorney General.

FEBRUARY, 1920.

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INDEX.

	Page
Statement	1
Assignment of errors	5
Propositions	6
Argument	7
I. A writ of mandamus should not issue in this case in view of the pendency of the suit in equity brought to cancel for fraud the receipt and certificate issued on relator's entry	7
II. The relator being guilty of fraud is not entitled to relief	11
III. The proviso to section 7 of the Act of March 3, 1891, 26 Stat. 1095, 1099, does not bar action by the Secretary in case of fraud	16

CITATIONS.

STATUTES.

Act of March 2, 1891, 26 Stat. 1095	2, 13, 16, 18, 21
Act of June 4, 1897, 30 Stat. 11	19
R. S. section 2301	13

CASES.

Cosmos Exploration Co. v. *Gray Eagle Oil Co.*, 190 U. S. 301	19
Duncan Townsite Co., v. *Lane*, 245 U. S. 308	10, 11
Hegerty, James A., 35 L. D. 252	13
Harris, Jacob A., 42 L. D. 611	21
Hoglund, Rose, 42 L. D. 605	17
Hoglund, Rose, 43 L. D. 594; 569	17
Knight v. *U. S. Land Ass'n*, 142 U. S. 161	8
Lane v. *Hoglund*, 244 U. S. 174	4, 15, 16
Lane v. *United States ex rel Newton*, 48 App. D. C. 547	4
Lidgett, Fred, 35 L. D. 371	13
Minnesota v. *Lane*, 247 U. S. 243	19
People ex rel Power v. *Rose*, 219 Ill. 46	9
Springfield v. *County Com'rs*, 10 Fick. 58	15
The King v. *Lyme Regis*, 1 Doug. K. B. 169	15
The King v. *The Archbishop of York*, 6 Term Rep. 490	15
Turner v. *Fisher*, 222 U. S. 204	8, 14

MISCELLANEOUS.

High, on Extraordinary Legal Remedies (3d ed.), section 26	11

In the Supreme Court of the United States.

OCTOBER TERM, 1920.

JOHN BARTON PAYNE, *Secretary of the Interior*, and CLAY TALLMAN, *Commissioner of the General Land Office, plaintiffs in error*,
v.
THE UNITED STATES OF AMERICA, *ex rel.* ALLEN L. NEWTON.
} No. 123.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR PLAINTIFFS IN ERROR.

STATEMENT.

The writ of error in this case brings up for review the judgment of the Court of Appeals of the District of Columbia which affirmed the judgment of the Supreme Court of the District, awarding a writ of mandamus commanding the Secretary of the Interior and the Commissioner of the General Land Office to issue a patent to relator upon his homestead entry for lands in the State of Washington.

In his petition (R. 1–3) relator Newton alleged that in 1904 he filed an application to enter certain lands within the Seattle Land District; that said

application was duly allowed and thereafter he made final commutation proof in support thereof, whereupon receiver's receipt and register's certificate were issued to him November 21, 1904; that at the expiration of two years from the issuance of said receipt and certificate no contest, protest, or other proceeding had been instituted against his final entry, but that on November 27, 1908, proceedings were instituted by the Land Department which resulted in the cancellation of the entry; that subsequently, upon application to the Secretary of the Interior, an order was entered May 14, 1918, directing the reinstatement of the entry and the issuance of patent thereon; that pursuant thereto, the entry was reinstated, approved for patent, and patent thereon was about to be issued when, upon intervention of the Department of Justice, issuance thereof was withheld; that notwithstanding the terms of the Act of March 3, 1891, ch. 561, 26 Stat. 1095, 1099, entitling petitioner to a patent upon his entry, the patent was being withheld.

To the rule to show cause issued upon this petition the Secretary of the Interior and the Commissioner of the General Land Office made answer (R. 6–8) that the land covered by Newton's homestead entry had, prior to the application for that entry, been withdrawn for forestry purposes and subsequently included in a national forest; that the allowance of Newton's entry in the face of this withdrawal, and the issuance of receiver's receipt and register's certificate on the proof tendered in support of said

entry, were obtained by Newton fraudulently and by false representations and proofs to the effect that he had made settlement upon said lands prior to the withdrawal and that he had since said settlement continuously resided upon the same and had placed substantial improvements thereon and had cultivated a portion of the lands; that these false representations and proofs were made by Newton with full knowledge of their falsity and with intent to deceive the officials of the Land Department and to induce them to allow his filing and to accept his commutation proof and to issue to him the receiver's receipt and register's certificate; that said officials were deceived thereby, and acted in reliance on said false and fraudulent representations.

It was further alleged in the answer that the action of the Land Department in cancelling the entry was predicated upon a specific finding that the entryman Newton had not established and maintained residence upon the land covered by his entry, said finding being based upon evidence adduced on behalf of both the Government and Newton at a hearing conducted pursuant to the rules of practice of the Land Department.

It was also averred that the decision of the Department of the Interior upon Newton's petition for the exercise of supervisory power, by which the entry was reinstated and patent ordered issued, was predicated solely upon the supposed lack of jurisdiction of that Department to entertain the proceedings which resulted in the previous cancellation of the

entry, and was in no way predicated upon a reconsideration of the facts in the case or a conclusion that the finding of facts was erroneous; that the evidence in the case clearly supports the conclusion that the issuance of final receipt and certificate was fraudulently procured through false testimony, and, were patent issued it would be the clear duty of respondents to request the Attorney General to institute a suit to cancel the patent; that in view of the clear, unequivocal and convincing evidence of fraud, the Attorney General, at the request of the Secretary of the Interior and Secretary of Agriculture, had instituted a suit in the United States District Court for the Western District of Washington against Newton and others to cancel the final receipt and certificate issued upon this entry and to quiet title in the United States to the land covered by said entry.

The petitioner demurred to the answer on the ground that the decision of this court in *Lane* v. *Hoglund*, 244 U. S. 174, disposes of all matters set forth in the answer and that all inquiry in regard to the validity of the entry was barred after the lapse of two years from issuance of receipt and certificate thereon.

The Supreme Court of the District of Columbia sustained the demurrer (R. 9) and awarded a writ of mandamus commanding the respondents to issue a patent to relator Newton.

Upon appeal, the Court of Appeals affirmed that judgment. R. 16–17. Opinion, R. 11–16, 48 App. D. C. 547.

ASSIGNMENT OF ERRORS.

(R. 18–19.)

1. The Court of Appeals erred in affirming the judgment of the Supreme Court of the District of Columbia in favor of the appellee Newton and directing the issuance of a mandamus against the appellants.

2. The Court of Appeals erred in not reversing the judgment of the Supreme Court of the District of Columbia in favor of the appellee Newton and directing the issuance of a mandamus against the appellants.

3. The Court of Appeals erred in holding that the limitation in section 7 of the act of March 3, 1891 (26 Stat. 1095), is jurisdictional and a complete bar after the lapse of two years from the issuance of final receipt and certificate to any action against a fraudulent entry prior to the issuance of patent.

4. The Court of Appeals erred in not holding that the limitation in section 7 of the act of March 3, 1891 (26 Stat. 1095), is not jurisdictional and not a complete bar after the lapse of two years from the issuance of final receipt and certificate to any action against a fraudulent entry prior to the issuance of patent.

5. The Court of Appeals erred in holding that after the lapse of two years from the date of the issuance of the receiver's final receipt the Land Department is without jurisdiction to cancel the final receipt for fraud.

6. The Court of Appeals erred in not holding that after the lapse of two years from the date of the issuance of the receiver's final receipt the Land Department has jurisdiction to cancel the final receipt for fraud.

7. The Court of Appeals erred in holding that after the lapse of two years from the issuance of final receipt, the United States has no right to invoke the aid of a court of equity to cancel for fraud the final receipt and certificate.

8. The Court of Appeals erred in not holding that after the lapse of two years from the issuance of final receipt, the United States has the right to invoke the aid of a court of equity to cancel for fraud the final receipt and certificate.

9. The Court of Appeals erred in affirming the judgment of the Supreme Court of the District of Columbia directing the issuance of a writ of mandamus pending the determination of the suit instituted in the United States Court for the Western District of Washington to cancel for fraud the final receipt and certificate.

10. The Court of Appeals erred in not reversing the judgment of the Supreme Court of the District of Columbia directing the issuance of a writ of mandamus pending the determination of the suit instituted in the United States Court for the Western District of Washington to cancel for fraud the final receipt and certificate.

PROPOSITIONS.

Under this assignment of errors we submit the following propositions:

1. A writ of mandamus should not issue in this case, in view of the pendency of the suit in equity brought to cancel for fraud the receipt and certificate issued on relator's entry.

2. The relator being guilty of fraud is not entitled to relief.

3. The proviso to section 7 of the Act of March 3, 1891, 26 Stat. 1095, 1099, does not bar action by the Secretary in cases of fraud.

ARGUMENT.

I.

A writ of mandamus should not issue in this case, in view of the pendency of the suit in equity brought to cancel for fraud the receipt and certificate issued on relator's entry.

We earnestly contend that the pendency of the suit which the United States has instituted in the United States District Court for the western district of Washington should stay the court in awarding mandamus.

That suit was filed at the request of the Secretary of the Interior and the Secretary of Agriculture. The requests for the action were predicated upon the clear, unequivocal and convincing evidence of fraud in respect to the securing of the allowance of the entry and the issuance of receipt and certificate upon the proof. There being fraud in the case it is certain that the Government has a remedy. If it cannot obtain this remedy in the Land Department it surely can obtain it in the courts.

It is no answer to this proposition to say that such remedy can be obtained in the courts only after the patent is issued, for, if the remedy exists, the issuance of patent is not a prerequisite to securing it. The Secretary of the Interior would do a vain and foolish

thing to issue a patent on an entry where fraud was shown and immediately after issuing the patent to ask the Attorney General to bring suit to cancel it. Much more would it be an anomalous thing for a court of justice, in the face of fraud, to compel the performance of an act in order that the consequences of that act might be avoided in a subsequent suit.

In *Knight* v. *U. S. Land Ass'n.*, 142 U. S. 161, this court quoted approvingly an excerpt from a decision of the Secretary of the Interior, which is particularly apt in this case, thus, at page 178:

> For example, if, when a patent is about to issue, the Secretary should discover a fatal defect in the proceedings, or that by reason of some newly ascertained fact the patent, if issued, would have to be annulled, and that it would be his duty to ask the Attorney General to institute proceedings for its annulment, it would hardly be seriously contended that the Secretary might not interfere and prevent the execution of the patent. He could not be obliged to sit quietly and allow a proceeding to be consummated, which it would be immediately his duty to ask the Attorney General to take measures to annul. It would not be a sufficient answer against the exercise of his power that no appeal had been taken to him and therefore he was without authority in the matter.

In the case of *Turner* v. *Fisher*, 222 U. S. 204, affirmance of the judgment below in refusing mandamus to compel the Secretary of the Interior to reenter relators' names on a roll of Creek Freedmen was predicated in part upon this proposition (p. 209):

> 7. To have issued the writ would have involved the useless thing of requiring relators' names to be reentered, and in other proceedings having their names stricken because the original enrollment had been procured by fraud, thus admitted by the demurrer.

The case of *People ex rel. Power* v. *Rose*, 219 Ill. 46, bears analogy to the case at bar. In that case mandamus was sought to compel the respondent Secretary of the State of Illinois to receive a report and issue final certificate of incorporation to relators forming the United States Express Company. The refusal of the Secretary of State was based upon the fact that the action demanded would be a fraud upon a corporation or joint stock company known as the United States Express Company (and referred to as the "old United States Express Company") which had for years been doing business in the State of Illinois and throughout the United States and foreign countries. The Supreme Court of Illinois found that under the allegations in the case, the "old United States Express Company" would have the right to restrain by injunction the use of the name proposed to be used by relators. In view of this mandamus was refused, the court saying (pp. 58, 59):

> The writ of *mandamus* will not be issued, if its issuance would fail to accomplish a good purpose, or to have a beneficial effect. "The writ is not granted as a matter of absolute right, and where it can be seen that it cannot accomplish any good purpose, or that it will

> fail to have a beneficial effect, it will be denied." (*Christman* v. *Peck*, 90 Ill. 150; *People* v. *Lieb*, 85 id. 484; *Illinois Watch Case Co.* v. *Pearson*, 140 id. 423.) It is difficult to see how the issuance of the writ in this case could accomplish any good purpose, or have any beneficial effect, if the new corporation, proposed to be organized, could be enjoined from using the name of the old company, and doing business under that name.

To require the Government to wait until patent issued before bringing suit to vindicate its rights might result in serious embarrassment. It might, for instance, be urged in defense of such a suit that the Government passed title to the land when it knew of the fraud as fully and completely as it did when it brought its suit. Again, the right of a transferee might intervene to the prejudice of the Government's right to recover the land.

The position of the relator in this case is well described by what this court said with respect to one in like circumstances in *Duncan Townsite Co.* v. *Lane*, 245 U. S. 308, 312:

> The relator having itself only an equity seeks the aid of the court to clothe it with the legal title as against the United States, which now holds both the legal title and the equity to have set aside an allotment certificate secured by fraud. A writ of mandamus will not be granted for such a purpose. See *Turner* v. *Fisher*, 222 U. S. 204.

II.

The relator being guilty of fraud is not entitled to relief.

The answer of the respondents in this case charged fraud upon the part of the relator with respect to his entry and the procuring of the evidences of his equitable rights. The demurrer of relator to this answer admits the fraud.

In this situation it is clear that the writ of mandamus should not be awarded. While mandamus is a legal process it is not a writ awarded as a matter of right,—rather its issuance is based upon equitable principles. The relator here does not come into court with clean hands, hence he has no standing such as would entitle him to the writ. The courts will not countenance fraud and the writ will not issue to condone or perpetuate a fraud.

> It is important that a person asking the aid of a mandamus for the enforcement of his rights should come into court with clean hands; and when the proceedings have been tainted with fraud and corruption, the relief will be denied, however meritorious the application may be on other grounds.
>
> *High* on *Extraordinary Legal Remedies* (3d ed.), § 26, citing *Commonwealth* v. *Henry*, 49 Pa. St. 530.

As was said by Mr. Justice Brandeis in delivering the opinion of this court in *Duncan Townsite Co.* v. *Lane*, *supra* (pp. 311, 312):

> Mandamus is an extraordinary remedial process which is awarded, not as a matter of right, but in the exercise of a sound judicial

> discretion. It issues to remedy a wrong, not to promote one; to compel the performance of a duty which ought to be performed, not to direct an act which will work a public or private mischief or will be within the strict letter of the law but in disregard of its spirit. Although classed as a legal remedy, its issuance is largely controlled by equitable principles.

The Court of Appeals apparently considered that this principle was not applicable to this case because it believed that the fraud was not well pleaded and hence not admitted by the demurrer. In disposing of this point the court, in our view of the case, lost sight of the proper application of the principle which we here assert.

Let us now consider the allegations of the answer. Newton had not applied to enter the land here involved when the withdrawal for forestry purposes was made. That withdrawal excepted from its force and effect only *valid* claims properly initiated prior to the date thereof. Answer, R. 6. Therefore, as to every other claim the withdrawal constituted an adverse and superior claim. When Newton applied to make entry it was essential that he show settlement upon the lands prior to withdrawal and continuous residence thereon from time of settlement, and also substantial cultivation of the tract. Had he failed to make that showing his application to enter would have been denied, and it was only because he made a showing that he had met these requirements that it was allowed.

The answer alleged that the allowance of his entry in the face of the withdrawal was secured by false and fraudulent representations with respect to prior settlement, residence, and cultivation.

Again, to warrant the issuance of receiver's receipt and register's certificate, it was essential that Newton, by the proof made by him should also show continuous residence upon the land and substantial cultivation from his first settlement until date of proof. The proof he offered was commutation. Section 2301, R. S., as amended by the act of March 3, 1891, ch. 561, § 6 (U. S. Comp. Stats. Ann., 1916, § 4589). To meet the requirements of the law as interpreted by the Land Department, the substantial continuous occupancy of the land by the entryman was essential. *James A. Hagerty*, 35 L. D. 252; *Fred Lidgett*, Id. 371. A higher degree of compliance with the law is required than under the ordinary *final* proof.

Since, as averred in the answer, the allowance of the entry and the issuance of receipt and certificate were obtained by false representations that relator Newton, both before and after the withdrawal and up to submission of proof, had resided continuously upon the land, the word "continuously" has an added and specific significance and importance.

If the answer had merely stated that the allowance of the entry and issuance of receipt and certificate had been obtained by fraud and by false and fraudulent representations, admittedly that would have been insufficient. However, we have in this case

such an allegation supplemented by a statement of the particulars in which the representations were false and fraudulent. This apprises the relator of the basis for the charge of fraud, and fulfills the fundamental requirements of good pleading.

It was particularly set forth in the answer that the reinstatement of the entry of relator was ordered solely because of the supposed lack of jurisdiction of the Department of the Interior to entertain the proceedings which resulted in the previous cancellation of the entry, and not because the conclusion of the Secretary on the contest proceedings was erroneous.

It is also distinctly averred that the evidence in the case clearly supports the conclusion that the issuance of receipt and certificate was fraudulently procured through false testimony and that if a patent were to issue it would be the plain duty of respondents to request that suit be instituted to secure the annulment of such patent; and that in view of the evidence of fraud a suit had been instituted and was then pending to cancel the entry.

The Secretary of the Interior, by his sworn answer in the case, avers that he has found fraud in respect to relator's entry, and that a suit has been authorized by the Attorney General to cancel the entry because of such fraud. These allegations, being admitted by the demurrer, abundantly justify the refusal of the writ.

In the case of *Turner* v. *Fisher*, *supra*, an answer of the Secretary of the Interior to a rule to show cause

upon a petition for mandamus was held sufficient as a defense when the allegation was that "on information and belief" the relators' "enrollment had been procured by fraud." It is true that reference was made to certain testimony upon which the Secretary had taken the action complained of. But in the case at bar, although the testimony adduced at the contest proceedings against Newton's entry was not made a part of the answer, the ultimate facts found by the Secretary and upon which he decided against the validity of the entry are pleaded.

We think the Court of Appeals did not keep clearly in mind the function of a writ of mandamus and the principles which control its issuance. If relator is not clearly and upon equitable principles entitled to the writ, it should be denied regardless of whether every technicality of precise pleading has been met. The first test is of the relator's right, not of the respondents' justification for refusing to act.

The courts are reluctant to award a writ of mandamus against an executive officer. *Lane* v. *Hoglund, supra.*

Presumption and intendment, so far as they go, must be in favor of returns, not against them, and it is sufficient if the return discloses a fair legal reason why the mandamus should not issue. *Springfield* v. *County Com'rs of Hampden*, 10 Pick. (Mass.) 58, 67; *The King* v. *Lyme Regis*, 1 Douglas K. B. 149, 157, 158, 159; *The King* v. *The Archbishop of York*, 6 Term Reports, 490, 493, 495.

III.

The proviso to section 7 of the act of March 3, 1891; 26 Stat. 1095, 1099, does not bar action by the Secretary in cases of fraud.

The courts below took the view that the instant case is not distinguishable from the case of *Lane* v. *Hoglund*, 244 U. S. 174, therefore they held that the Secretary of the Interior was without power to entertain proceedings against the entry after the lapse of two years from the issuance of receiver's receipt to Newton upon his entry, in view of the proviso to section 7 of the Act of March 3, 1891, ch. 561, 26 Stat. 1095, 1099 (U. S. Comp. Stats. Ann. 1916, § 5113), and only the ministerial duty remained to issue a patent.

We assert that the case is distinguishable from *Lane* v. *Hoglund*, because in that case there was no allegation of fraud in the procurement of the allowance of the entry and the issuance of final receipt and certificate, as in this case. The pleadings and agreed statement of fact in that case contained no allegation or statement that the entry had been cancelled for fraud.

Moreover, Hoglund's claim presented strong equities, and there were differences of opinion as to whether the evidence adduced in the proceedings in the Land Department showed noncompliance with the law. Both the local land officers and the Commissioner of the General Land Office rendered decisions in favor of Hoglund; the Secretary reversed those decisions and held that Hoglund had not com-

plied with the law as to residence and cultivation of the land and that the withdrawal of the land for forestry purposes attached and was superior to his claim. On petition for exercise of supervisory power, the First Assistant Secretary of the Interior, after referring to the evidence which showed continuous residence of over fourteen months after withdrawal, found (42 L. D. 405, 406, 407):

> It sufficiently appears from the record, in addition to what has been hereinbefore stated, that Hoglund made a valid settlement upon the land; that he has expended in the neighborhood of $1,000 in improvements thereon; that he was practically without means when the entry was made and that he expended his surplus earnings in improving the land; that six years have elapsed since the issuance of final certificate and there is no suggestion that he had sold or contracted to sell the land or the timber, or done any other act suggestive of speculation or bad faith, nor is there evidence that he has had any other home than on the land under consideration,

and held that in view of the equities, Hoglund's final proof might be accepted as commutation proof and that he be allowed to complete the entry as such.

Thereafter, Secretary Lane reversed that decision and held the withdrawal a bar to Hoglund's rights inasmuch as he was not found to have been in compliance with the law at the date thereof. *Svan Hoglund*, 43 L. D. 538; Id., 540, on petition for supervisory authority.

In the instant case we have all the Land Department officials deciding against the validity of Newton's entry and Newton, for nearly six years after cancellation of his entry, acquiescing therein. In this connection, it is important to note that the answer of respondents herein distinctly states that the reinstatement of relator's entry was ordered only because of the Land Department's *supposed* lack of jurisdiction to have entertained the proceedings under which the final judgment of cancellation was entered.

Therefore the decision in the *Hoglund* case is not a precedent in this case, and it must be read and construed in the light of the fact that the court had no question of fraud before it and consequently did not pass upon or consider the question of the effect of fraud upon the operation of the proviso to section 7 of the Act of March 3, 1891.

The proviso in question is as follows:

> *Provided*, That after the lapse of two years from the date of the issuance of the receiver's receipt upon the final entry of any tract of land under the homestead, timber-culture, desert-land, or pre-emption laws, or under this act, and when there shall be no pending contest or protest against the validity of such entry, the entryman shall be entitled to a patent conveying the land by him entered, and the same shall be issued to him; but this proviso shall not be construed to require the delay of two years from the date of said entry before the issuing of a patent therefor.

Now the Court of Appeals, in discussing the effect of concealed fraud, held the answer insufficient because it did not set up when the fraud was discovered, why not sooner discovered, etc. R. 13. We assert that if it be conceded that the Land Department has jurisdiction at all, it is for that Department in the first instance to determine the question of the timeliness of the proceedings sought to be instituted. If after the expiration of two years a contest is filed in the Land Department, it is for the Secretary to determine whether he has jurisdiction and that question must first be raised before him. Until he has made a ruling the matter is still *in fieri*, and in such a situation it is well settled that the courts will not interfere. *Minnesota* v. *Lane*, 247 U. S. 243.

In the case of *Cosmos Exploration Co.* v. *Gray Eagle Oil Co.*, 190 U. S. 301, the complainant sought an injunction, receivership, and the quieting of title in it to certain lands embraced in a forest lieu selection made under the Act of June 4, 1897, 30 Stat. 11, 36, claiming full, complete and equitable title to the lands. It appeared that there was a protest then pending before the Land Department against the approval of said selection upon the ground that the land involved was mineral in character, but the complaint averred that such protest was insufficient to warrant a hearing as to the mineral character of the land because it failed to show certain facts.

On this point the court said (p. 308):

> If the Land Department has any jurisdiction over the subject matter, the question as

> to the sufficiency of the protest is one for the decision of that department, and its right to decide thereon is not taken from it by the averment of a legal conclusion contained in the complainant's bill that the department has no legal right to decide otherwise than in favor of the complainant upon the facts before it.

Now, if the Land Department has jurisdiction, the question of the sufficiency of pleading relative to discovery of the fraud, etc., is properly for the Secretary in proceedings before him. The Court of Appeals concedes that the Secretary has jurisdiction and then proceeds to pass upon questions of pleading and practice of which he alone would have cognizance if, as averred, he had jurisdiction to act. In other words, it vests him with jurisdiction but immediately takes it away before he can exercise it.

But we take even broader ground upon this question of the applicability of the proviso to section 7 and assert that in cases of fraud it is not operative. Such an interpretation of the proviso is at once consonant with the intent of Congress in enacting this legislation and the reason which prompted its enactment. The situation presented to Congress as the basis for the legislation was this:

A large number of final entries had been suspended by the General Land Office upon vague and indefinite charges of fraud. The Land Office was unable to have these cases investigated with any degree of expedition; the result was a practical blockade in

the issuance of patents to the serious prejudice of *bona fide* claimants. *Lane* v. *Hoglund*, *supra*, at page 180, citing Land Department decision in the case of *Jacob A. Harris*, 42 L. D., 611.

It is important to observe that the solicitude of Congress in the enactment of the legislation was for the *bona fide claimant* and it was for his relief and his benefit. To interpret it otherwise would be to impute to Congress a purpose to condone and reward fraud.

A further indication that the proviso was not to apply when fraud was known is shown by the language of the preceding portion of section 7. After providing for correction of clerical errors with respect to entries on public lands, it proceeds as follows (26 Stat. 1098, 1099):

> And all entries made under the preemption, homestead, desert-land, or timber-culture laws, in which final proof and payment may have been made and certificates issued and to which there are no adverse claims originating prior to final entry and which have been sold or incumbered prior to the first day of March, eighteen hundred and eighty-eight, and after final entry, to bona fide purchasers, or incumbrancers, for a valuable consideration, shall unless upon an investigation by a Government agent, fraud on the part of a purchaser has been found, be confirmed and patented upon presentation of satisfactory proof to the Land Department of such sale or incumbrance.

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Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. ~~405~~. 123

FRANKLIN K. LANE, SECRETARY OF THE INTERIOR, AND CLAY TALLMAN, COMMISSIONER OF THE GENERAL LAND OFFICE, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES OF AMERICA *EX REL.* ALLEN L. NEWTON.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

MOTION TO AFFIRM AND BRIEF OF DEFENDANT IN ERROR.

ALEX. BRITTON,
F. W. CLEMENTS,
Attorneys for Defendant in Error.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919.

No. 405.

FRANKLIN K. LANE, SECRETARY OF THE INTERIOR, AND CLAY TALLMAN, COMMISSIONER OF THE GENERAL LAND OFFICE, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES OF AMERICA *EX REL.* ALLEN L. NEWTON, DEFENDANT IN ERROR.

To the Solicitor General, respecting the plaintiffs in the above-entitled case, notice is hereby given that a motion to dismiss the writ of error or affirm the judgment of the court below with costs will be presented to the United States Supreme Court on March 1, 1920.

ALEX. BRITTON,
F. W. CLEMENTS,
Attorneys for Defendant in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1919.

No. 405.

FRANKLIN K. LANE, *Secretary of the Interior, and* CLAY TALLMAN, *Commissioner of the General Land Office, Plaintiffs in Error,*

vs.

THE UNITED STATES OF AMERICA *ex Rel.* ALLEN L. NEWTON, *Defendant in Error.*

MOTION TO DISMISS OR AFFIRM.

Comes now the defendant in error and moves the court to dismiss the writ of error or affirm the judgment of the court below with costs, upon the ground that the questions on which the writ of error was taken are fully disposed of by the decision of this court in the case of Lane, Secretary of the Interior, *vs.* Hoglund (244 U. S., 174), and that it is manifest the writ of error can be for delay only, and therefore further argument is unnecessary.

ALEX. BRITTON,
F. W. CLEMENTS,
Attorneys for Defendant in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1919.

No. 405.

FRANKLIN K. LANE, *Secretary of the Interior, and* CLAY TALLMAN, *Commissioner of the General Land Office, Plaintiffs in Error,*

vs.

THE UNITED STATES OF AMERICA *ex Rel.* ALLEN L. NEWTON, *Defendant in Error.*

In support of the motion to dismiss or affirm a short statement is necessary.

The land here involved is within the Seattle Land District in the State of Washington. Plat of survey of the township was filed in the district land office September 8, 1904, whereupon the defendant in error made his homestead entry, and thereafter, in accordance with due notice by publication, submitted proof in consummation of his entry, paid the purchase price, and the receiver's receipt on final entry was issued to him November 21, 1904 (Record, page 2).

At the expiration of two years from the issuance of receiver's receipt on final entry no contest, protest, or other proceeding had been instituted against defendant's entry, and he thereupon became entitled to patent under the proviso to section 7 of the act of March 3, 1891 (23 Stats., 1095-1099, Record, page 2).

On November 27, 1908, over four years after the issuance of the receiver's receipt, proceedings were instituted for the cancellation of defendant's entry for failure to comply with the homestead law in the matter of residence and cultivation, as a result of which defendant's entry was ordered cancelled March 23, 1912 (Record, page 2).

It is our contention that this case is controlled by the decision of this court in the case of Lane, Secretary of the Interior, *vs.* Hoglund (244 U. S., 174). In this connection it should be said that on the advice of the Solicitor for the Interior Department the petition for mandamus was not earlier filed in defendant's behalf, but following the decision of this court in the Hoglund case a petition was filed with the Secretary of the Interior for the reinstatement and patenting of defendant's entry, and upon said petition the Secretary of the Interior, by an order dated May 14, 1918, addressed to the Commissioner of the General Land Office, ordered the reinstatement and patenting of defendant's entry (Record, pages 4-5).

Acting under this direction, the Commissioner of the General Land Office reinstated defendant's entry, and on June 4, 1918, approved the same for patent, and the patent was about to issue when, on the request of the Department of Justice, the issuance of the patent was withheld, and it became necessary thereupon to file these proceedings in mandamus.

To the rule that issued answer was made, to which a demurrer was filed, and on hearing the demurrer was sustained with judgment for the defendant in error. The case was thereupon carried to the Court of Appeals of the District of Columbia, in which the judgment of the Supreme Court of the District sustaining the demurrer was affirmed with costs, and the case is now further prosecuted to this court upon a writ of error.

It will be seen that the plaintiffs in error, when uncontrolled, awarded to the defendant his right to a patent on

his homestead entry as sought in these proceedings; that when, thereafter, under the advice of the Department of Justice, the formal issuance of the patent was withheld, making these proceedings necessary, the Supreme Court of the District of Columbia, and again the Court of Appeals of the District of Columbia, each in turn, sustained the claim of the defendant in error and held the case controlled by the decision of this court in the Hoglund case. This latter case was presented at great length in this court and the opinion fully disposes of the contentions sought to be raised on the present writ of error. It would seem, therefore, that further time should not be consumed in a further hearing of this matter, and that summary action is fully justified.

ALEX. BRITTON,
F. W. CLEMENTS,
Attorneys for Defendant in Error.

INDEX.

STATUTES.

	Page.
Act of March 3, 1891 (26 Stats., 1095), proviso, section 7.....	2
Section 2301, U. S. R. S.....	11

CASES.

Knight vs. Land Ass'n (142 U. S., 161).....	16
Lane, Sec'ty, &c., vs. Hoglund (244 U. S., 174).....	2

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 123.

JOHN BARTON PAYNE, SECRETARY OF THE INTERIOR AND CLAY TALLMAN, COMMISSIONER OF THE GENERAL LAND OFFICE, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES OF AMERICA EX REL. ALLEN L. NEWTON.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR APPELLEE IN ERROR.

Statement.

This case comes before the court with concurring decisions below granting the petition for the writ of mandamus to compel the issuance of a patent upon the homestead entry of Allen L. Newton.

Newton made homestead entry at the district land office, Seattle, Washington, September 8, 1904, upon which he made proof in commutation of his entry and paid the purchase price, whereupon receiver's receipt and certificate of final entry were issued to him November 21, 1904. At the expiration of two years from the issuance of receiver's receipt on final entry, no contest, protest, or other proceedings had been instituted against said final entry, nor was any such proceeding instituted until November 27, 1908, more than four years after the issuance of the receiver's receipt on final entry, when proceedings were directed upon an adverse report of a forest officer charging, in effect, that the entryman had not complied with the law in the matter of residence and cultivation, and as result of a hearing ordered on this charge Newton's entry was ordered canceled March 23, 1912.

Upon a petition filed with the Secretary of the Interior under date of January 29, 1918, that officer, by order dated May 14, 1918, in view of the decision of this court in the case of Lane *vs.* Hoglund (244 U. S., 174), revoked the order of cancellation and ordered the reinstatement and patenting of Newton's entry. Acting under this order the Commissioner of the General Land Office, under date of June 4, 1918, approved Newton's entry for patent, and patent was about to issue when the Department of Justice requested the issuance and delivery of the patent be withheld; whereupon these proceedings were instituted to compel the issuance and delivery of the patent, as directed by the proviso to section 7 of the act of March 3, 1891 (26 Stats., 1095-1099), which reads:

> *Provided*, That after the lapse of two years from the date of the issuance of the receiver's receipt upon the final entry of any tract of land under the homestead, timber-culture, desert-land, or pre-emption laws, or under this act, and when there shall be no pending contest or protest against the validity of such entry, the entryman shall be entitled to a patent con-

veying the land by him entered, and the same shall be issued to him; but this proviso shall not be construed to require the delay of two years from the date of said entry before the issuing of a patent therefor.

The answer on behalf of the defendant admitted the above-stated facts, and in addition thereto alleged that the land embraced in Newton's entry was withdrawn with a view of inclusion within a forest reserve December 27, 1902; that the allowance of Newton's entry and the issuance of the receiver's final certificate "were obtained by said relator New-"ton fraudulently and by false representations and proofs, "to the effect that he had made settlement upon the land "prior to the withdrawal of said land as aforesaid, and that "he had since said settlement continuously resided upon the "same and had placed substantial improvements thereon and "had cultivated a portion of said land and raised crops "thereon." It will be noted that this is but a general traverse of Newton's proof showing.

It was further alleged that since the institution of these proceedings and the issuance of the rule to show cause a suit in equity had been brought in the United States Circuit Court for the Western District of Washington for the cancellation of the final receipt and to quiet title to said land in the United States. For the information of the court it should be said that all proceedings in this cause have been suspended to await the result of this action.

Relator demurred to this answer, designating the points for argument.

1. That the decision of the court in the case of Lane, Secretary, *ex.* Hoglund, *supra*, disposes of all matters set forth in said answer, and

2. That the allegations of fraudulent representations by the relator are indefinite and insufficient to constitute a defense, and that, so far as disclosed, the allegations indicate

what would be plain on a more definite statement, namely, that they relate solely to the quality of the residence of Newton upon the land entered as meeting the terms and requirements of the homestead law, inquiry into which was clearly barred after the expiration of two years from the issuance of receiver's receipt on final entry, and cannot be inquired into in these proceedings.

In both the Supreme Court of the District of Columbia and the Court of Appeals of the District of Columbia, it was earnestly urged on behalf of the defendant that the demurrer admitted fraud on the part of the relator, which was sufficient to take the case out of the operation of the statute, and on that ground it was sought to differentiate this case from the holding of this court in the case of Lane *vs.* Hoglund, *supra*.

In both courts below, in sustaining the petition for the writ, it was held, in effect, that by the proviso to section 7 of the act of 1891 the jurisdiction with regard to inquiry into the validity of a homestead entry was transferred from the Land Department to the courts, where, at the expiration of the two years' limitation after issuance of final receipt, no contest, protest, or other proceeding had been directed against the entry; that the allegations of the answer with respect to the alleged fraud were not sufficient to constitute a defense; that a mere declaration of fraud could not restore jurisdiction after it has been lost by the running of the statute; that to resume jurisdiction in such a case recourse must be had to a proceeding in equity, a jurisdiction not possessed by the Land Department; that this action is not to perpetuate a fraud, or compel the performance of an act which would have that result, but to compel the performance of a mere ministerial act imposed by statute, and that if fraud in fact exists it can be remedied in the courts as Congress has specially directed.

In the brief filed in this court under the assignment of errors from the decision of the Court of Appeals of the District of Columbia, three propositions are submitted:

First. A writ of mandamus should not issue in this case, in view of the pendency of the suit in equity brought to cancel for fraud the receipt and certificate issued on relator's entry.

Second. The relator, being guilty of fraud, is not entitled to relief.

Third. The proviso to section 7 of the act of March 3, 1891, 26 Stat., 1095, 1099, does not bar action by the Secretary in cases of fraud.

ARGUMENT.

In answer to these contentions we say:

The decision of this court in the case of Lane, Secretary, etc., vs. Hoglund, 244 U. S., 147, controls.

In the Hoglund case the land involved was within the limits of a forest reservation, established by proclamation May 6, 1905. Proceedings were instituted against Hoglund's entry after the expiration of the two years following the issuance of receiver's receipt on final entry. On the record made in these proceedings, the Secretary of the Interior, in ordering cancellation of Hoglund's entry, specifically held—

> "that the defendant has not complied with the law as to residence and cultivation of land; that his alleged residence upon the tract prior to the date of his entry, and until May, 1906, was in the nature of occasional visits."

and because of this finding he adjudged that the forestry withdrawal of 1905 had attached. Hoglund, in his final proof, claimed continuous residence from settlement in 1902, and it was argued that his receiver's receipt "was fraudulently obtained by him on false proof." If the Secretary of the In-

terior retained jurisdiction to inquire regarding Hoglund's compliance with law after the expiration of two years from issuance of receiver's receipt on final entry, then the holding of that officer could not have been reviewed on mandamus proceedings. But this court held that the jurisdiction of the Land Department to inquire regarding Hoglund's entry had been lost, and that nothing remained but the performance of a ministerial duty to issue the patent as by the statute exacted. In the opinion of this court in the Hoglund case, at page 181, it was said:

> "* * * Looking, then, at the statute in the light of all that bears upon its purpose and meaning, we think it certainly and unmistakably lays upon the Secretary of the Interior, as the head of the Land Department, a plain duty to cause a patent to be issued to a homestead entryman whenever it appears, as concededly it did in this instance, that two years have elapsed since the issue of the receiver's receipt upon the final entry and that during that period *no proceeding has been initiated or order made which calls in question the validity of the entry.* In the exercise of its discretion Congress has said, in substance, by this statute that for two years after the entryman submits final proof and obtains the receiver's receipt the entry may be held open for the initiation of proceedings to test its validity, but that if none such be begun within that time it shall be passed to patent as a matter of course. Thus in a case like this, where according to the conceded facts no proceeding was begun within the prescribed period, there is no room for the exercise of discretion or judgment, but on the contrary a plain duty to see that the entryman receives a patent." (Italics ours.)

It was supposed that with this clear expression of the court no further difficulty would arise in the administration of the proviso to section 7 of the act of March 3, 1891, and just here it should be stated that when the proceedings in mandamus were instituted in the Hoglund case like proceed-

ings were begun in two other cases, whereupon it was agreed with the officers of the Interior Department that further suits would not be filed, and that should the Hoglund case result in issuance of the writ of mandamus other cases of a like nature might be revived in the Land Department on the filing of a petition invoking supervisory power to correct the previous mistake in cancellation of an entry after the running of the statute. It was in accordance with this understanding that petition for the reinstatement and patenting of your relator's entry was filed with the Land Department following the decision of this court in the Hoglund case, and, as appears by the record, the officers of the Land Department found no difficulty in construing the decision of this court and applying it in favor of your relator, recalling the previous order cancelling his entry and directing its reinstatement and patenting. It is now argued in the brief filed in this court that relator waited five years after cancellation of his entry before instituting proceedings. We take it that this explanation is sufficient without further consideration in this contention.

It might also be said at this point that certain of the officers of the Department of Justice were never satisfied with the result of action in the Hoglund case, and it was because thereof that the Secretary of the Interior was requested to withhold the issuance to your relator of the patent necessitating the institution of proceedings in mandamus. These same officers directed the answer to be filed and have prosecuted the proceedings in both courts below on behalf of the plaintiffs in error

Let us now look to the record in this case: It is shown that your relator, after full compliance with law and the regulations of the Land Department, made his entry of the land here involved; that he submitted proof after due notice by publication in commutation of his homestead without protest or objection, and that he paid the purchase price and received receiver's receipt and certificate on final entry. At

the expiration of two years from the issuance of receiver's receipt on final entry, no protest, contest or other proceeding had ever been filed against your relator's entry, and it was not until about two years later, or about four years after the issuance of the receiver's receipt on final entry, that investigation was directed against your relator's entry, *not upon any charge of fraud*, but upon the report of a forest officer challenging your relator's compliance with the homestead law in the matter of residence and improvements. It must be clear, then, that the Land Department had no jurisdiction to entertain these proceedings, and if this be true, the record made therein is but naked paper, and of no effect for any purpose. When these proceedings were directed against your relator's entry, the Land Office holding approved by the Department in the case of Mertie C. Traganza, 40 L. D., 300, was in force. Thereunder the statute of 1891 "had no reference to proceedings by the United States, or its officers or agents," and did not "affect the conduct or action of the Land Department in taking up and disposing of final proofs of entrymen *after the lapse of the two years mentioned in the act.*"

The answer in this cause, as before stated, while using the terms "fraudulently and by false representations and proofs," merely makes a general traverse of your relator's showing on final proof with respect to settlement, residence, improvements, and cultivation and amounts to nothing more than a statement of the conclusions of the pleader. There is an entire absence of any reference to facts sufficient to set up fraud as a defense, assuming that such facts properly pleaded could at this late day restore the jurisdiction of the Land Department to inquire therein, its jurisdiction having been lost by failure to institute proceedings against your relator's entry within the statutory period of two years following the issuance of receiver's receipt on final entry.

The only possible support that can be found in the answer to the veiled charge of fraud is the statement that "said re-

spondents allege that the evidence in the case clearly supports the conclusion that the issuance of final receipt and final certificate was fraudulently procured through false testimony." The evidence here referred to is evidently the evidence taken in the proceedings begun after the Land Department had lost jurisdiction to inquire into relator's compliance with the law, and here, also, we have but a conclusion unsupported by any recitation of facts shown in said proceedings which might have enabled the court to test the reasonableness of the conclusion stated, if deemed material.

In commenting upon this situation, the Court of Appeals in its decision in this cause used the following language:

> "The vague and evasive language here employed to set up fraud, without any attempt to justify the delay, is indicative of a fictitious defense."

When jurisdiction was assumed by the Land Department and proceedings directed against your relator's entry after the statute had run, and when the record of said proceedings was reviewed by the Secretary of the Interior, no judgment of fraud was entered, the judgment of cancellation being based merely upon a finding of failure on the part of your relator to show compliance with the homestead law in the matter of residence.

For the information of the court, we append to our brief a copy of the decision of the Secretary of the Interior when cancellation of your relator's entry was ordered, and in order that the situation may be better understood, as the records of the Land Department are always available to this court, we have also appended a copy of the report of the special agent who, after examination, made report upon your relator's entry.

From this report it will be seen that the field service was cognizant of the running of the statute and for that reason, within the two-year period, made a mere formal protest

hoping thereby to toll the statute. If they had data sufficient on which to base adverse proceedings and delayed action until jurisdiction was lost by expiration of time, the proceeding later begun was in any event barred. The report indicates, however, that there was never any good reason for attacking the entry, even in the absence of the statute.

When the record in this case is reviewed in the light of the brief filed in this court on behalf of the plaintiffs in error, it is apparent that the indefinite charges with respect to fraud on the part of your relator amounts to nothing more than a charge that he had failed to comply with the requirements of the homestead law, and particularly with respect to the quality of his residence, as viewed in the record made in the proceedings directed by the Land Department after the statute had run.

On page 13 of plaintiffs' brief it is said:

> "The answer alleged that the allowance of his entry in the face of the withdrawal was secured by false and fraudulent representations with respect to prior settlement, residence, and cultivation.
>
> Again, to warrant the issuance of receiver's receipt and register's certificate, it was essential that Newton, by the proof made by him should also show continuous residence upon the land and substantial cultivation from his first settlement until date of proof. The proof he offered was commutation. Section 2301, R. S., as amended by the act of March 3, 1891, ch. 561, sec. 6 (U. S. Comp. Stats. Ann., 1916, sec. 4589). To meet the requirements of the law as interpreted by the Land Department, the substantial, continuous occupancy of the land by the entryman was essential. James A. Hagerty, 35 L. D., 252; Fred Lidgett, *Id.*, 371. A higher degree of compliance with the law is required than under the ordinary final proof.
>
> Since, as averred in the answer, the allowance of the entry and the issuance of receipt and certificate were obtained by false representations that relator Newton, both before and after the withdrawal and up

> to submission of proof, had resided continuously upon the land, the word 'continuously' has an added and specific significance and importance."

It will be remembered that your relator, in perfecting his homestead entry, availed himself of the provisions of section 2301 of the Revised Statutes, commonly known as the commutation provision of the homestead law. This section originally read:

> "SEC. 2301. Nothing in this chapter shall be so construed as to prevent any person who has availed himself of the benefits of section twenty-two hundred and eighty-nine from paying the minimum price for the quantity of land so entered, at any time before the expiration of the five years, and obtaining a patent therefor from the Government, as in other cases directed by law, on making proof of settlement and cultivation as provided by law, granting pre-emption rights."

Under the pre-emption law any person who made settlement on public lands subject to pre-emption, and who inhabited and improved the same and erected a dwelling thereon, was authorized, on making proof of such facts, to purchase the land so settled upon. It will be noted that no period of residence was exacted. In the administration of the law, however, a period of six months following the settlement was required. When the homestead law was passed, a provision was inserted granting the right of pre-emption to those making a homestead entry—that is, granting the right to complete the homestead in the same manner as a pre-emption—and this became section 2301, above quoted. This section 2301 was amended by section 6 of the act of March 3, 1891, being the preceding section to the one under which your relator seeks the protection of this court, and as amended section 2301 reads as follows:

> "SEC. 2301. Nothing in this chapter shall be so construed as to prevent any person who shall here-

> after avail himself of the benefits of section two hundred and eighty-nine from paying the minimum price for the quantity of land so entered at any time after the expiration of fourteen calendar months from the date of such entry, and obtaining a patent therefor, upon making proof of settlement and of residence and cultivation for such period of fourteen months, and the provision of this section shall apply to lands on the ceded portion of the Sioux Reservation by act approved March second, eighteen hundred and eighty-nine, in South Dakota, but shall not relieve said settlers from any payments now required by law."

There is plainly nothing in this amendment suggesting a different quality of residence from that originally exacted under the section before amendment. The only change was a definite period of residence for the indefinite period as required under the pre-emption law. It is not our purpose to extend the argument in this particular further than to show the real nature of the answer filed in this cause, and that any possible suggestion of fraud rests upon an interpretation of section 2301, U. S. R. S., and goes directly, as heretofore stated, to the question of your relator's compliance with the requirements of the homestead law, more particularly as to the quality of his residence, a matter clearly foreclosed to investigation by the Land Department, where no proceeding had been begun within two years from the issuance of the receiver's receipt on final entry.

It is further contended on the part of the plaintiffs in error that the proviso to section 7 of the act of March 3, 1891, was only for the protection of *bona fide* claimants, and it is assumed from this contention that the Land Department continued to retain jurisdiction to inquire whether the party making the entry was a *bona fide* claimant, even after the two-year period had expired. It is said, on pages 21 and 22 of plaintiffs' brief, filed in this court:

"It is important to observe that the solicitude of Congress in the enactment of the legislation was for the *bona fide* claimant and it was for his relief and his benefit. To interpret it otherwise would be to impute to Congress a purpose to condone and regard fraud.

A further indication that the proviso was not to apply when fraud was known is shown by the language of the preceding portion of section 7. After providing for correction of clerical errors with respect to entries on public lands, it proceeds as follows (26 Stat., 1098, 1099):

'And all entries made under the pre-emption, homestead, desert-land, or timber-culture laws, in which final proof and payment may have been made and certificates issued and to which there are no adverse claims originating prior to final entry and which have been sold or incumbered prior to the first day of March, eighteen hundred and eighty-eight, and after final entry, to *bona fide* purchasers, or incumbrancers, for a valuable consideration, shall unless upon an investigation by a Government agent, fraud on the part of a purchaser has been found, be confirmed and patented upon presentation of satisfactory proof to the Land Department of such sale or incumbrance.'

It will be observed that the classes of entries to which that part of the section refers are the same as those covered by the proviso, namely, pre-emption, homestead, desert-land, and timber-culture; further, that the entries are final entries, that is, those upon which proof and payment have been made and certificate issued—again like those specified in the proviso.

But the significant part of the section, so far as it relates to our present consideration, is that it provides for issuance of patents on such entries only in case there has been a transfer or incumbrance of the lands, made more than three years before the act and after final entry, to a *bona fide* purchaser or incumbrancer; but patent is not to issue if it is found upon investigation that the purchaser is guilty of fraud.

Having thus provided for issuance of patent only

where the rights of a purchaser without fraud have intervened, can it be fairly or reasonably asserted that after so protecting the Government against fraud Congress intended in the very next part of the section to provide for issuance of patents, not for the benefit of an innocent transferee but in aid and for the benefit of those who by fraud obtained final receipts and certificates upon their entries? Such inconsistency cannot be imputed to Congress.

Summarized, the section provides, in the part just referred to, for the protection of *bona fide* purchasers; in the proviso, for the protection of *bona fide* entrymen. Neither fraudulent purchasers nor fraudulent entrymen are entitled to the benefits of the law."

In answer thereto, we call the attention of the court to the fact that the purpose and protection extended by the *body* of section 7 of the act of 1891, and by the *proviso* attached thereto, are clearly separate and distinct. The body of the section was designed to protect *bona fide* purchasers or encumbrancers where the land had been sold or encumbered after final entry and before March 1, 1898. In such a case no inquiry was to be made, or further prosecuted, regarding the validity of the entry sold or encumbered, there being a complete confirmation of the entry in favor of such purchaser or encumbrancer. The confirmation was effective even as against pending proceedings begun by the Government, or on contest against the entry begun by an individual challenging the validity of the entry or the entryman's compliance with law. The only saving clause was that in favor of an adverse claim originating prior to final entry.

With respect to the proviso, its purpose was entirely different. Suspension of final entries on vague and indefinite suggestions of fraud or non-compliance of law to await investigation by special agents created a practical blockade in the Land Department in the issuance of patents on the classes of entries named, and to correct this situation, and provide

against its repetition, the proviso was directed. To accomplish this, the period of the suspension and investigation in the Land Department, *prior to the issuance of patent*, was limited to two years following the issuance of the receiver's receipt on final entry, and where, at the expiration of that time, there was no pending contest or protest, or, in other words, no proceeding had been begun challenging the validity of the entry, the patent was to be issued, but in the issuance of such patent there is no confirmation either in favor of the entryman or any possible transferee. As said by this court in the Hoglund case, *supra*:

> "In the exercise of its discretion Congress has said, in substance, by this statute, that for two years after the entryman submits final proof and obtains the receiver's receipt, the entry may be held open for the initiation of proceedings to test its validity, but if none such be begun within that time, it shall be passed to patent as a matter of course."

With the issuance of patent, the jurisdiction for inquiry *in any regard* respecting the entryman's right to a patent is transferred to the courts. In a case coming within the provisions of the body of said section, all further proceedings are barred either in the Land Department or in the courts, but a patent issued in obedience to the proviso is open to attack in the court, as is any other patent issued in regular course under the public-land laws. So that if any fraud can be shown with regard to the procurement of either original or final entry by the relator, as said by the court below, "it can be remedied in the courts, as Congress has expressly directed."

But, it is said:

> "The Secretary of the Interior would do a vain and foolish thing to issue a patent on an entry where fraud was shown and immediately after issuing the

> patent to ask the Attorney General to bring suit to cancel it. Much more would it be an anomalous thing for a court of justice in the face of fraud to compel the performance of an act in order that the consequences of that act might be avoided in a subsequent suit."

Opposing counsel fail to grasp the purpose of the proviso to section 7, here under consideration. The sole purpose of that proviso was, as before stated, to limit the jurisdiction of the Secretary of the Interior with respect to investigation regarding the validity of a final homestead where no proceeding challenging the validity was begun within the two-year period named therein. Without jurisdiction, it is not within the competency of the Secretary of the Interior to investigate and adjudge an entry fraudulent, and the cases referred to in this particular are clearly distinguishable from that at bar. The case of Knight *vs.* United States Land Association, 142 U. S., 161, involved a survey of a private grant which had received the approval of the Commissioner of the General Land Office. The matter was brought to the attention of the Secretary of the Interior, and that officer refused to approve of the action of his subordinate and directed a further survey, and his action in that regard was questioned in the case referred to. In disposing of the matter, this court quoted approvingly from the Secretary's decision. (See p. 178 of the Opinion.) This quotation is taken from the decision of the Land Department, 5 L. D., 494, and is as follows:

* * * * * * *

> "The statutes in placing the whole business of the Department under the supervision of the Secretary, invest him with authority to review, reverse, amend, annul or affirm all proceedings in the Department having for their ultimate object to secure the alienation of any portion of the public lands, or the adjustment of private claims to lands, with a just regard to

the rights of the public land and of private parties. Such supervision may be exercised by direct orders or by review on appeals. The mode in which the supervision shall be exercised in the absence of statutory direction may be prescribed by such rules and regulations as the Secretary may adopt. When proceedings affecting titles to lands are before the Department the power of supervision may be exercised by the Secretary, whether these proceedings are called to his attention by formal notice or by appeal. It is sufficient that they are brought to his notice. The rules prescribed are designed to facilitate the Department in the despatch of business, not to defeat the supervision of the Secretary. For example, if, when a patent is about to issue, the Secretary should discover a fatal defect in the proceedings, or that by reason of some newly ascertained fact the patent, if issued, would have to be annulled, and that it would be his duty to ask the Attorney General to institute proceedings for its annulment, it would hardly be seriously contended that the Secretary might not interfere and prevent the execution of the patent. He could not be obliged to sit quietly and allow a proceeding to be consummated, which it would be immediately his duty to ask the Attorney General to take measures to annul. It would not be a sufficient answer against the exercise of his power that no appeal had been taken to him and therefore he was without authority in the matter."

It will be noted that the matter there under consideration was clearly within the jurisdiction of the Land Department. This jurisdiction ordinarily continues until the issuance of patent on a homestead entry, and so long as the matter is within the jurisdiction of the Department it might rightly refuse to issue a patent if, in its opinion, it would be its duty, if it issued the patent, to institute a proceeding at once to set it aside. But the clear difference between that case and the case at bar is that a statute of the United States has interposed terminating the jurisdiction of the Interior Department for

the purpose of investigation into the validity of the entry and directing the issuance of patent. In so doing, it must have been contemplated that cases might arise where suit would be advisable after the issuance of the patent, for by the following section, namely, section 8 of the act of 1891. it was provided:

> "That suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents."

The possibility of suit, however, cannot be made the basis for extending the jurisdiction of the Land Department, lost through its failure to institute proceedings against a final homestead entry within two years following the issuance of the receiver's receipt on final entry. To grant the contention of opposing counsel in this matter would have that effect. The real purpose of the proviso to said section 7 is, as before stated, to transfer the jurisdiction after the expiration of the two-year period to the courts if attack upon the entry is to be thereafter made, and at the same time to clothe the entryman with the protection of a patent. The remaining cases cited by counsel in this regard do not arise under the public-land laws, and in nowise involve matters that in the slightest degree reflect upon the sole question here, namely, the jurisdiction of the Secretary of the Interior to inquire or make judgment or finding with respect to the validity of a homestead entry or the entryman's compliance with law where, within the period of two years following the issuance of the receiver's receipt on final entry, no proceeding challenging the validity of the entry had been begun.

It therefore follows:

First. That the decision of this court in the Hoglund case fully disposes of the case at bar, and requires the issuance of patent to your relator as sought in these proceedings;

Second. That no question of fraud is properly put in issue in these proceedings, even if a charge of fraud would be within the province of the Land Department to inquire, after the expiration of the two-year period following the issuance of the receiver's receipt on final entry and when within that period no proceedings had been begun challenging the validity of the entry;

Third. That the issuance of patent to your relator will but open the way to appropriate proceedings in the courts to test your relator's right thereto under the homestead law and his compliance shown thereunder, and

Fourth. That if upon a mere charge of failure to comply with the law lodged against an entry after the two-year period named in the statute had run, proceedings can then be begun in the Land Department to investigate whether there has been a *bona fide* compliance with law on the part of the entryman, or, in other words, whether the claimant is a *bona fide* entryman, entitled to the protection extended by the proviso to section 7, here in question, the statute is robbed of its effectiveness and becomes a dead letter, for, in this way, the jurisdiction lost by the expiration of the two-year period is revived, and the period of investigation is continued at the pleasure of the officials charged with the administration of the law.

ALEXANDER BRITTON,
F. W. CLEMENTS,
Attorneys for Appellee.

APPENDIX.

Copy.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *March* 23, 1912.

D-18101.

Ex Parte ALLEN L. NEWTON.

"R."
Seattle 0782.
H. E. cancellation.
Affirmed.

Appeal from the General Land Office.

Allen L. Newton has appealed to the Department from the decision of the Commissioner of the General Land Office of June 27, 1911, sustaining the local officers, holding for cancellation his homestead entry No. 18956 (serial 0782), made September 8, 1904, for the N. E. ¼ S. W. ¼, W. ½ S. W. ¼, and S. W. ¼ N. W. ¼, section 20, T. 23 N., R. 10 E., Seattle, Washington, land district. Commutation proof was submitted upon said entry and final certificate issued thereon November 21, 1904, settlement being alleged upon the land about the first of October, 1902. The tract, with other lands, was temporarily withdrawn December 18, 1902, and embraced within the Washington National Forest (now Snoqualmie), March 2, 1907.

The plat of survey of said township 23 was filed in the local office September 8, 1904. Proceedings were directed against said entry November 27, 1908, based upon the adverse report of a forest officer, charging:

(1) That claimant never established and maintained residence on the land.

(2) That none of the land has been cleared or cultivated.

A hearing was had before the local officers in March, 1910, the Government being represented by a special agent, assisted by a forest officer, and claimant appearing in person with counsel and witnesses.

The record has been examined and it is found that the facts shown by the testimony are clearly and sufficiently set forth in the decision of the Commissioner and fully warrant the conclusion that the claimant did not in good faith establish and maintain residence on the land to the exclusion of a home elsewhere. The decision appealed from is affirmed.

(Signed) CARMI A. THOMPSON,
Assistant Secretary.

Copy.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
SEATTLE, WASHINGTON, *July* 7, 1908.

Hon. Commissioner
General Land Office,
Washington, D. C.

Through E. W. Dixon,
Chief of Field Div., G. L. O.,
Spokane, Wash.

SIR:

Allen L. Newton made homestead entry No. 18956, Sept. 8, 1904, for the N. E. ¼ of S. W. ¼ W. ½ of S. W. ¼, and S. W. ¼ of N. W. ¼ of section 20, T. 23 N., R. 10 E., W. M., and after duly advertising the land submitted proof under commutation and on November 21, 1904, final cash certificate, No. 20461, issued as a basis for patent.

On May 28, 1906, former Chief of Division Dennett reported, as follows:

> "I have collected sufficient evidence in this case to warrant my filing a protest against the issuance of patent. I do this at this time before making a formal report on form 4-480 in order to prevent the two years statute from running in favor of the entryman."

I do not find that any further action was taken in the matter and no report (form 4-480) appears to have been filed.

On the 27th and 28th of June, '08, I examined this tract of land, took note of the improvements thereon and interviewed different persons with reference to the entryman at North Bend and Snoqualmie, Wash., and later interviewed the entryman in the case who now appears to be residing at Everett, Wash.

The entryman in this case appears to be one among four who settled on lands in this township prior to the date of the survey and the filing of the plat on Sept. 8, 1904, all of whom, except the one under consideration, have received their patents. All, except one who availed himself of army service, submitted proof under commutation and paid the double-minimum price of $2.50 per acre for their lands, same being within the place limits of the Northern Pacific R'y Company. They all lived at Snoqualmie and Falls City, Wash., when not residing upon their places and conducted businesses of different kinds at the places stated, and were men with families, with the exception of the said Newton. The houses constructed by the four homesteaders are exactly of the same dimensions, viz: 12 x 14 feet, constructed of the same material, and the work done in the way of clearing up land is, approximately, the same.

I tried to find persons who were in position to know in a very substantial way as to the residence of the said Newton and as to the character of evidence which might be procured

in the event it was found proper to make an adverse report and recommend a hearing.

Those with whom I have talked, merchants and business men of North Bend and Snoqualmie, Wash., express the opinion that the said Newton made a substantial residence on the tract of land during the late spring, summer and fall of the two years prior to the date he submitted proof and state that a better residence was made by the said Newton than the others who have received their patents, giving their reasons for making such statement that the said Newton was an unmarried man and was at all times in position to go when conditions in the mountains would permit, as he had trustworthy persons to put in charge of his business. The several parties interviewed stated that all the testimony they could give would certainly be in the interest of the entryman and venture the opinion that no one can be found who will be willing to testify adversely, except to state that the entryman did reside a portion of his time at Snoqualmie, Wash., when not on his land.

It is evident to my mind that the entryman, Newton, as well as the other three who have received their patents, have not literally complied with the requirements of the homestead law, but evidence sufficient to procure a cancellation of this entry can not be obtained. I am further convinced that the only reason why any complaint has been made against the said Newton is by reason of political differences which have involved the party from whom he has borrowed money with which to pay for his land and to perfect some business deals, viz: James Ryley. This statement is based upon the talk I had with a party of several business men at Snoqualmie, and particularly the most prominent merchant of the place, Mr. Nye, who asserts that he has heard a statement, in the presence of several witnesses, to the effect that it was the intention to see the said Ryley, the mortgagee, lose the amount loaned to the entryman.

The entryman has upon his place, in addition to the house

referred to in the foregoing report, furnishings of the usual character found, viz., bed, bedding, cooking utensils, stove, etc. About ¾ of an acre cleared and several spots appeared to have been planted to garden, but nothing grown during the present or last year. A part of the land can be cultivated but, like the rest of the township, is heavily timbered.

Affidavits have been furnished by the entryman, showing that he is still the owner of the land and from Albert E. Conover, Frank L. Park and Peter Kenedy as to the acts of the entryman, all of which will be found inclosed.

I am unable to find evidence to warrant adverse action against this entry and must therefore recommend same be passed to patent.

Very respectfully,
(Signed) PERCY F. SMITH,
Special Agent of the G. L. O.

SUPREME COURT OF THE UNITED STATES.

No. 123.—October Term, 1920.

John Barton Payne, Secretary of the Interior, et al., Plaintiffs in Error, vs. The United States *ex rel.* Allen L. Newton. } In Error to the Court of Appeals of the District of Columbia.

[March 14, 1921.]

Mr. Justice Van Devanter delivered the opinion of the Court.

This was a petition to the Supreme Court of the District of Columbia for a writ of mandamus commanding the Secretary of the Interior and the Commissioner of the General Land Office to pass a homestead entry to patent. A demurrer to the answer was sustained, the defendants elected to stand on the answer, and a judgment awarding the writ was entered. The Court of Appeals affirmed the judgment, 48 App. D. C. 547, and the defendants prosecute this writ of error under § 250, cl. 6, of the Judicial Code.

The important statute, the construction of which is drawn in question by the defendants, is a provision in § 7 of the act of March 3, 1891, c. 561, 26 Stat. 1095, 1099, which declares:

"That after the lapse of two years from the date of the issuance of the receiver's receipt upon the final entry of any tract of land under the homestead, timber-culture, desert-land, or preemption laws, or under this act, and when there shall be no pending contest or protest against the validity of such entry, the entryman shall be entitled to a patent conveying the land by him entered, and the same shall be issued to him."

The facts which stand admitted can be shortly stated. Allen L. Newton, the relator, made a preliminary homestead entry at the local land office of a quarter section of land. At that time the land was withdrawn for forest purposes, but with the qualification that prior homestead settlers who continued in good faith to maintain their claims should be permitted to carry them to entry and

patent. Newton claimed to be a prior settler and within the qualification. In due course, after publication of the regular notice, he submitted commutation proofs under the homestead law and paid the purchase price and the legal fees. The local land officers found the proofs satisfactory, permitted him to make final entry and issued thereon the usual receiver's receipt. That was on November 21, 1904, and there was no protest, contest or other proceeding against the entry within two years, nor until November 27, 1908. On the latter date the Commissioner of the General Land Office ordered a hearing upon a charge that Newton had not complied with the law in point of residence and cultivation; and on March 23, 1912, the Secretary of the Interior held in that proceeding that the charge was sustained and ordered the entry canceled. On May 14, 1918, the Secretary rescinded that order and directed that the entry be passed to patent under the statute before quoted. The following month the Secretary recalled his last action and caused a suit to be brought in the District Court of the district wherein the land is situate to cancel the receiver's receipt and quiet the title in the United States. The bill in that suit charged that the entry was fraudulently procured in that the proofs submitted by Newton in respect of his settlement, residence and cultivation were false; and that charge is repeated in the answer in the present case. Further proceedings in the suit in the District Court have been suspended, it is said, to await the ultimate decision on this petition.

Both courts below held that, as the final entry was not questioned by any protest or contest in the land department within two years after the issue of the receiver's receipt, the statute—the provision in § 7—terminated the authority of that department to entertain any proceeding for the cancelation of the entry and cast upon the Secretary and the Commissioner a plain and unqualified duty to pass the entry to patent. Whether that ruling was right or otherwise is the matter we are to consider.

The words of the statute are direct and make it very plain that if at the expiration of two years from the date of the receiver's receipt on final entry there is "no pending contest or protest" against the entry its validity no longer may be called in question in the land department—that is to say, "the entryman shall be entitled to a patent . . and the same shall be issued to him."

The purpose to fix his right and to command its recognition is obvious. This court so held in *Lane* v. *Hoglund*, 244 U. S. 174, where a writ of mandamus directing the issue of a patent was awarded. In that case, as in this, there was no contest or protest within the designated period, and in a proceeding subsequently initiated the Secretary held that the entryman had not complied with the law in point of residence and cultivation—in other words, that the proofs by which he procured the entry were false—and upon that ground the cancelation of the entry was directed. Besides, the entry there bore the same relation to a forest reserve that the present entry bears. Thus in all that is material the two cases are alike. In the opinion in that case it was pointed out that the practice of the land department prior to the statute had been to entertain and act upon belated suggestions of fraud and noncompliance with law, that this had resulted in a practical blockade in the issue of patents and that the purpose of the statute was to rectify that situation and prevent its recurrence. The court then observed, p. 181, "In the exercise of its discretion Congress has said, in substance, by this statute that for two years after the entryman submits final proof and obtains the receiver's receipt the entry may be held open for the initiation of proceedings to test its validity, but that if none such be begun within that time it shall be passed to patent as a matter of course."

In the main the land department, as its regulations and decisions show, has construed and applied the statute as taking from the land officers all power to entertain proceedings for the cancelation of final entries of the classes specified, save where the proceeding is begun within the two-year period,—and this whether it is initiated by a government officer or by a private individual, and whether it is based upon a charge of fraud or upon some other ground. To illustrate: In the original instructions of May 8, 1891, 12 L. D. 450, the department took the position that it no longer could cancel such an entry or withhold the patent "on the ground of fraud, a failure to comply with the law, or a prior claim," unless a proceeding for the purpose was initiated within the period prescribed. In the case of *Jacob A. Harris*, 42 L. D. 611, decided December 13, 1913, the Secretary of the Interior adhered to that position as grounded upon a "sound construction of the law," overruled a decision to the contrary made two years before and rejected a

protest presented after the allotted time which charged that the entryman, contrary to the statements in his proofs, had not complied with the law in the matter of settlement, residence and cultivation. And in instructions issued April 25, 1914, 43 L. D. 294, the Secretary stated that the lapse of two years after the issue of the receiver's receipt "will bar a contest or protest based upon any charge whatsoever," save where the proceeding is sustained by some special statutory provision.

The defendants now call that construction in question. But we perceive no reason for rejecting or disturbing it. On the contrary, we think it is in accord with the natural import of the words of the statute and gives effect to the evident purpose of Congress. That purpose is to require that the right to a patent which for two years has been evidenced by a receiver's receipt, and at the end of that period stands unchallenged, shall be recognized and given effect by the issue of the patent without further waiting or delay, —and thus to transfer from the land officers to the regular judicial tribunals the authority to deal with any subsequent controversy over the validity of the entry, as would be the case if the patent were issued in the absence of the statute. See *Brown* v. *Hitchcock*, 173 U. S. 473, 477. Of course, the purpose is not merely to enable the officers to issue the patent—for which they have other express authority—but to command them to issue it in the event stated,—the words of the statute being "the entryman shall be entitled to a patent conveying the land by him entered, and the same shall be issued to him."

It is urged that the pendency in the District Court of the suit before mentioned affords a sufficient justification for withholding the patent. The courts below held otherwise, and rightly so, as we think. The statute contemplates that in the event stated the patent shall not longer be withheld, but shall be issued promptly to the end that the entryman shall have the advantages and protection which go with it. In other words, it is intended that he shall be clothed with the legal title instead of an equitable title only, shall have a patent instead of a receiver's receipt, and shall have the benefit of the presumptions which are available to other patentees when their rights are called in question. But for this the statute would be without any real purpose or effect.

Judgment affirmed.